Massachusetts Rules of the Supreme Judicial Court

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CHAPTER ONE : GENERAL RULES

1:01 Definitions; Conflict with other rules

These rules shall be construed to secure the just, speedy and inexpensive determination of every case. Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter. As used in these rules the following terms shall be deemed to have the following meanings:

"Superior Court" shall mean the Superior Court Department of the Trial Court, or a session thereof for holding court.

"Housing Court" shall mean a division of the Housing Court Department of the Trial Court, or a session thereof for holding court.

"Probate Court" shall mean a division of the Probate and Family Court Department of the Trial Court, or a session thereof for holding court.

"Land Court" shall mean the Land Court Department of the Trial Court, or a session thereof for holding court.

"District Court" or "Municipal Court" shall mean a division of the District Court Department of the Trial Court, or a session thereof for holding court. Except when the context means something to the contrary, said words shall include the Boston Municipal Court Department.

"Municipal Court of the City of Boston" shall mean the Boston Municipal Court Department of the Trial Court, or a session thereof for holding court.

"Juvenile Court" shall mean the Boston Division, the Worcester Division, the Springfield Division, and the County of Bristol Division of the Juvenile Court Department of the Trial Court, or a session thereof for holding court.

"Chief Justice" of a Trial Court Department shall mean the "Administrative Justice" of that Department.

To the extent of any conflict between the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Criminal Procedure, the Massachusetts Rules of Appellate Procedure and the rules of the Supreme Judicial Court, the Appeals Court, and the various Departments of the Trial Court, the Massachusetts Rules of Civil, Criminal and Appellate Procedure shall control.

1:02 Sittings of the Supreme Judicial Court

Sittings of the full court for hearing questions of law pursuant to G.L. c. 211, § 12, as amended, shall be held at Boston on the first Monday of October, November, December, January, February, March, April and May, and at such other places or times as the court from time to time may order.

1:03 Uniform certification of questions of law

Section 1. Authority to Answer Certain Questions of Law.
This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking.
This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order.
A certification order shall set forth
(1) the question of law to be answered; and
(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order.
The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the

certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Section 5. Costs of Certification.
Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 6. Briefs and Arguments.
Proceedings in this court shall be those provided in these rules, the Massachusetts Rules of Appellate Procedure or statutes governing briefs and arguments, so far as reasonably applicable.

Section 7. Opinion.
The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties.

Section 8. Power to Certify.
This court on its own motion or the motion of any party may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 9. Procedure on Certifying.
The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 10. Uniformity of Interpretation.
This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

Section 11. Short Title.
This rule may be cited as the Uniform Certification of Questions of Law Rule.

1:04 Judicial Conference

G.L. c. 211, § 3B, as amended.

(1) The Massachusetts Judicial Conference is hereby constituted to consist of the following: (a) the Chief Justice (who shall serve as chairman of the Conference) and the Associate Justices of this court; (b) the Chief Justice of the Appeals Court; (c) the Chief Administrative Justice of the Trial Court; (d) the Administrative Justice of the Superior Court Department; (e) the Administrative Justice of the Probate and Family Court Department; (f) the Administrative Justice of the Land Court Department; (g) the Administrative Justice of the Housing Court Department; h) the Administrative Justice of the District Court Department; (i) the

Administrative Justice of the Boston Municipal Court Department; (j) the Administrative Justice of the Juvenile Court Department; (k) the Chairman of the Judicial Council; (l) the Trial Court Administrator; and (m) the Administrative Assistant to the Supreme Judicial Court (G.L., c. 211; § 3A), who shall act as secretary and as the principal administrative officer of the Conference.

(2) The judges and officers mentioned in paragraph (1) shall serve as the members of the Conference until further order of this court. Any member may designate another member of the court or body which he represents to act for him at any meeting.

(3) The Conference may invite other judges and members of the bar (a) to participate in any one or more projects, studies, meetings, or other activities, or (b) to prepare and present studies, recommendations, and comments upon matters concerning which the Conference desires information.

(4) The Conference (a) may consider and make recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice in such manner as the Conference from time to time may deem appropriate; (b) may initiate and conduct legal research; (c) shall assist this court in coordinating the activities of the several courts; (d) may conduct general conferences and educational meetings; (e) may appoint reporters, advisers, research assistants, and other employees, either for the general work of the Conference or for designated projects and, subject to the availability of necessary funds, may make expenditures, including the payment of the foregoing persons; (f) may employ such facilities of universities, law schools, colleges, bar associations, foundations, and other institutions, as may be made available to it; and (g) may appoint standing or special committees. The Chief Justice of this court may appoint a vice-chairman of the Conference and may delegate to him duties with respect to the Conference.

(5) The Conference shall meet at such times as may be designated by the Chief Justice or a majority of the Justices of this court.

1:05. Certain contracts by Judicial Officers

(1) Except as provided by paragraph (4), by statute, or by other rule or order of this court, no judge of a court shall enter into, order, or approve a contract on behalf of the Commonwealth or any of its political subdivisions requiring the expenditure of funds or the incurring of a liability in excess of any appropriation therefor, or for which no appropriation has been made, without the written approval of the appropriate judicial officer designated by this court. The following officers are so designated: for the Appeals Court, its Chief Justice; for each department of the Trial Court, its Administrative Justice. Every judge seeking such approval shall file a written request for approval with the appropriate judicial officer and a copy with the Chief Administrative Justice of the Trial Court. Every request shall be in the form of a memorandum and shall set forth the following: (a) the nature and cost of the facilities, goods or services sought; (b) an explanation of the circumstances causing the judge to consider it reasonably necessary to the proper execution of the court's responsibilities; (c) a chronological account of administrative action previously taken to secure it; and (d) a statement of the action contemplated by the judge.

(2) The appropriate judicial officer may approve in writing a request made under paragraph (1) only upon a finding that the facilities, goods or services sought are reasonably necessary to the proper execution of the court's responsibilities, and subject to such instructions as he deems appropriate. If such request is approved by the judicial officer, he shall forthwith submit a copy of his approval to the Chief Administrative Justice.

(3) Any judge whose request under paragraph (1) is denied may appeal in writing to the Chief Administrative Justice, who shall make a final determination thereon.

(4) The only exception to paragraph (1) shall be in instances where failure to obtain the required facilities, goods, or services expeditiously and without delay will frustrate the execution of the court's responsibilities. In every such instance, the judge entering into, ordering or approving a contract on behalf of the Commonwealth or any of its political subdivisions shall forthwith submit a memorandum of the type required by paragraph (1) to the appropriate judicial officer, with a copy to the Chief Administrative Justice.

(5) Upon receipt of a copy of a memorandum filed under paragraph(1) or (4) the Chief Administrative Justice shall forthwith notify the Chief Justice of this court.

1:06 Records of the Supreme Judicial Court, of the Appeals Court, and of the Superior Court Department. Form, style and size of papers.

G.L. c. 221, § 27, as amended.

(1) The records of the Supreme Judicial Court, of the Appeals Court, and of the Superior Court Department in the several counties shall consist of the docket, the files, any extended record, which shall have been made at the promulgation of these rules, and whatever other specific records may be required by special statute, and no others.

(2) There shall be two dockets in the Supreme Judicial Court: a full court docket and a single justice docket. The single justice docket shall be kept by the clerk in each county.

(3) There shall be two dockets in the Superior Court Department: a civil action docket and a criminal docket.

(4) The dockets are records wherein the clerk shall register, by its title, every action, suit or proceeding, civil and criminal, commenced in, or transferred or appealed to, the court whereof he is clerk, according to the date of its actual entry. He shall note therein, according to the date thereof, the filing or return of any paper or process, the making of any order, rule, or other direction in or concerning such action, suit or proceeding, civil and criminal, the verdict or finding, the allowance of exceptions, and the entry of final judgment, final decree or order.

(5) The criminal docket shall be kept in the form heretofore in common usage, being substantially as provided in paragraph (4) hereof.

(6) The files are all papers and processes filed with or by the clerk of the court in any action, suit or proceeding therein, or before the justice thereof, including executions, with their returns. So far as reasonably practicable, they shall comply with S.J.C. Rule 1:08 in size and in other respects therein stated. All such papers and processes shall be numbered consecutively in each case as entered.

(7) Resort may be had to the docket, files, and any extended record, or full extended record, which has been made at the time of the promulgation of these rules, but the full extended record, where one has been made, shall control.

(8) The docket shall be kept either by the loose-leaf system or by a computer based record keeping system. Under the loose-leaf system the record shall be kept in typewriting, or partly in typewriting and partly in print, except as otherwise ordered by the court. Typewriter ribbons of permanent character shall be used. Those authorized for use on public records shall be regarded as sufficient under this rule, unless otherwise ordered by the court. The leaves of both docket and record when completed shall be strongly bound in volumes of appropriate size. Under the computer based record keeping system upon the completion of each case a printed paper copy of the docket shall be produced to provide a permanent record of the docket. The printed paper copy of the docket shall be strongly bound in volumes of appropriate size.

(9) Immediately after the final disposition of each action, suit or proceeding, complaint or indictment, papers constituting the files shall be assembled, collated, and arranged in order as theretofore numbered, and thereafter shall be kept in such order, except that executions may for greater safety be kept in a more secure place.

(10) The docket, files, and such extended and full extended records which shall have been made at the time of the promulgation of these rules, are to be kept in the clerk's office or in the custody of the clerk, and he is to be strictly responsible for them. They shall not be taken from his custody except in cases authorized by statute, by rule of court, for the preparation of the record for the full court, or for use by a justice of the court; but the parties may at all times have copies.

1:07 Fee Generating appointment and the Maintenance of Appointment Dockets in all Courts

Preamble
The Justices understand the importance of allowing judges the flexibility of selecting appointees based on the particular expertise needed in a given case. In recognition of the necessity to safeguard judicial discretion, a waiver from the requirement of successive appointments has been included in Rule 1:07. In making an appointment, a judge may select a qualified person who is not on the list or who is not next in order on the list by making a brief notation of the reasons for the selection.

The goal of this rule is to assure that all fee-generating appointments made by the courts of the Commonwealth are made on a fair and impartial basis with equal opportunity and access for all qualified candidates for appointments. The Justices have concluded that the fairest way to accomplish this goal, and at the same time avoid favoritism or the appearance of favoritism, is by

requiring each court to create lists of qualified candidates and then generally make appointments from those lists in rotation or sequential order.

(1) Annual Publication. At the beginning of each fiscal year, the chief justice of each Trial Court department and the chief justices of the appellate courts shall submit to the Chief Justice for Administration and Management (CJAM) a listing of the types of fee-generating appointments made in their department or court and the qualifications for those appointments. The CJAM shall compile the listings into a unified report which shall be published annually by the CJAM. The report shall include a description of the educational, professional, and other qualifications required for each type of appointment. The report shall state the method by which a person may apply to be considered for each particular type of appointment. It shall also include a statement that appointments of counsel for indigent defendants in criminal matters and for parties in certain non-criminal matters are governed by the Committee for Public Counsel Services (CPCS). An address and telephone number for interested persons to receive information on CPCS appointments shall be included in the report. This annual publication shall be accompanied by a statement from the Supreme Judicial Court that the appointments in the report are open to all qualified persons without regard to race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

(2) Court Lists. Every individual court making fee-generating appointments shall maintain a list of persons eligible for each type of appointment made by the court. The list shall be generated by the court or, where applicable, by CPCS. All court-generated lists shall be open to all qualified candidates and shall not be restricted to a fixed number of candidates. The method for removing individuals from a list shall be the responsibility of CPCS, in the case of CPCS-generated lists, and of the CJAM, in the case of court-generated lists. The lists shall be public.

(3) Successive Appointments. Each court appointment shall be made from the list maintained pursuant to section (2) of this rule, except as otherwise provided in section (4). Appointments from the list shall be made successively, except that, if an appointment is not made in successive order, the judge (or other person) making the appointment shall provide a brief written statement of reasons for not following the order of the list. For appointees compensated by CPCS, such written statement shall be kept by the Clerk, Register or Recorder in a separate file marked "CPCS appointments." A judge may direct that an appointment made successively from the list be entered administratively by the clerk, register, or recorder.

(4) Persons Not On List. If a judge appoints a person not on the list maintained pursuant to section (2), the judge (or other person) making the appointment shall provide a brief written statement of reasons for not appointing from the list.

(5) Appointment Docket. All clerks, registers, and recorders, for trial and appellate courts, shall establish and maintain, currently indexed, as part of the public records of the court open during regular business hours to public inspection, an appointment docket with respect to the appointment by the court of each fee-generating appointment, excluding appointees compensated by CPCS. The appointment dockets shall include the following:

(a) guardian ad litem,

(b) investigator appointed pursuant to G.L. c. 208, § 16,

(c) appraiser in any estate estimated to have gross assets in excess of $100,000,

(d) commissioner to sell real estate,

(e) appellate court conference counsel,

(f) master or special master,

(g) counsel in any civil matter,

(h) monitor for the administration of anti-psychotic medications,

(i) investigator in care and protection proceedings,

(j) title examiner,

(k) administrator, trustee, guardian, conservator, or receiver, whose appointment was not prayed for by name in a petition, pleading, or written motion, and any guardian or conservator who is an attorney, social worker or other social service professional unrelated to the ward by blood or marriage,

(l) any other fee-generating appointment not compensated by CPCS and not otherwise excluded by this section. The appointment of a guardian ad litem to serve process under G.L. c. 215, § 56B, shall not be entered on the appointment docket. The appointment of an executor, administrator, trustee, guardian, conservator or receiver shall not be entered on the appointment docket except as required by section (5)(k). Appointments shall be entered on the appointment docket regardless of the anticipated source, if any, of payment to the appointee.

(6) Data Collection. Such docket shall contain at a minimum the following:

(a) the docket number and, if the case file is available for public inspection or if access to the information is not otherwise prohibited, the name of the case,

(b) the date of the appointment,

(c) the name of the appointee,

(d) the position to which appointed,

(e) by whom the appointment was made,

(f) a notation if the appointment was not made successively from the court's list or if the appointee was a person not on the list, and

(g) the amount of any payment received and the source thereof (party, estate, or Commonwealth) or whether payment was waived or declined.

(7) Payments. No payment shall be made or received on account of any appointment required to be recorded in the appointment docket until a statement under the penalties of perjury, certifying the services provided, amount of payment, and itemization of expenses, is filed with the clerk, register, or recorder, to be placed with the papers in the case. No person holding an appointment required to be recorded in the appointment docket under section (5) of this rule shall make any payment to himself or herself until such payment is approved by the court.

(8) Compliance. Each appointment made under this rule shall include language on the document of appointment itself that section (7) of this rule must be complied with. After July 1, 2000, no person whose appointment is subject to this rule shall accept reappointment unless he or she has filed a certification that all fee reports for payments received in the previous fiscal year have been filed.

(9) Implementation. The CJAM shall promulgate, subject to the approval of the Supreme Judicial Court, such uniform practices as are necessary to implement this rule.

(10) Alternative Dispute Resolution Exclusion. The provisions of this rule are not applicable to fee-generating appointments made pursuant to Rule 1:18, Uniform Rules on Dispute Resolution.

1:08 Form, Style and Size of Papers Filed in all Courts.

(Applicable to all cases and to all courts. See S.J.C. Rules 1:06[7], 2:02, Rule 5[g] of Mass.R.Civ.P., and Rule 20 of Mass. R.A.P., each as amended.)

(1) Except as provided in this rule, papers (except exhibits) and processes filed with or by the clerk of the court in any court in the Commonwealth, or before a justice thereof, in any action, suit, or proceeding therein, including executions, with their returns, shall be, so far as reasonably practicable, approximately (but not larger than) eight and one-half inches by eleven in size, of standard quality of paper with adequate margins, and, except writs and other processes, approved Probate and Family Court Department printed forms, and printed briefs, shall be printed or typewritten upon one side only. It is desirable that blanks be filled in typewriting. All papers filed in appeals (civil or criminal) to the full Supreme Judicial Court, the full Appeals Court, or a statutory quorum of either shall comply with the informational requirements of Rule 20(b) of the Massachusetts Rules of Appellate Procedure. All papers filed in all other proceedings shall bear the name of the court and the county, the title of the action, the designation of the nature of the pleading or paper, and the name (written in capital letters or typed legibly, in addition to any signature required), address, and telephone number of the person or attorney filing the same, and, with respect to such papers filed by an attorney in the Supreme Judicial Court for the Commonwealth, the Supreme Judicial Court for Suffolk County and the Appeals Court, the attorney's Board of Bar Overseers (BBO) number. The court number of the case shall appear on each paper filed after the assignment of such a number.

(1A) With the exceptions appearing in paragraphs (1) and (2) of this rule and, with the exception of the Probate and Family Court Department, and applications for admission to the bar filed in the county court, all papers and processes in cases commenced after January 1, 1975, filed with or by the clerk of the court in any court in the Commonwealth shall not be folded. Backers are not required and should not be used.

(2) The District Court Department and the Boston Municipal Court Department by rule may exempt from the operation of this rule papers filed in small claims proceedings and in criminal cases. The District Court and the Juvenile Court Departments by rule may exempt from the operation of this rule papers filed in juvenile cases. However, when the clerks of these courts enter in the Superior Court Department papers exempted under this paragraph they shall adapt such papers to the requirements of this rule. In all courts there may be exempted by rule or order papers filed by parties appearing pro se.

(3) Any court by rule or order may provide for the effective enforcement of this rule.

1:09 Form of Original Executions for all Courts of the Commonwealth.

G.L. c. 235, §§ 22, 23.

Original executions to be issued in all courts of the Commonwealth on judgments against executors, administrators, and other fiduciary officers in their representative capacity, including any such original execution running against two or more parties, any one or more of whom are fiduciary officers as aforesaid in their representative capacity, or against sheriffs under G.L. c. 37, § 10, or special judgments entered under G.L. c. 235, § 24, shall in the last sentence after the words "in sixty days from the date hereof" contain the clause "or within ten days after this writ has been satisfied or discharged."

All other original executions to be issued on judgments in all courts of the Commonwealth shall contain a last sentence reading as follows:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said Court, at _____ within our county of _____ , within twenty years after the date of the said judgment, or within ten days after this writ has been satisfied or discharged."

No execution shall be invalid which conforms in substance to the provisions of this rule.

1:10 Form of Alias Executions for all Courts of the Commonwealth.

G.L. c. 235, § 22.

Alias and successive executions to be used in all courts of the Commonwealth shall contain the following: Immediately after the words, "We command you, therefore," there shall be inserted "as we have commanded you."

The last sentence shall be:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said _____ Court at _____ within our county of _____ within five years from the date hereof, or within ten days after this writ is satisfied in whole or discharged by law."

No execution shall be invalid which conforms in substance to the provisions of this rule.

1:11 Rule Relative to the Disposal of Old Court Papers and Records.

G.L. c. 221, § 27A, as amended.

A. Superior Court Department. Case papers or records of the Superior Court Department under the custody of clerks of the Superior Court Department may be selectively retained pursuant to the following requirements:

(1) In Berkshire, Franklin and Hampshire counties, a systematic sample of case papers consisting of 10% (docket numbers ending in "0") for the period from 1860 to 1969 and 2% (docket numbers ending in "00" and "50") after 1969 shall be retained. Except as provided in paragraphs (4) and (5) of section A of this rule, all other papers and records may be destroyed pursuant to the procedures established in Section A.

(2) In Hampden, Norfolk, Plymouth, and Worcester counties, a systematic sample of case papers consisting of 20% (docket numbers ending in "0" and "5") for the period from 1860 to 1889, of 10% (docket numbers ending in "0") from 1890 to 1919, of 5% (docket numbers ending in "00", "20", "40", "60", and "80") for the period from 1920 to 1969 and 2% (docket numbers ending in "00" and "50") after 1969 shall be retained. Except as provided in paragraphs (4) and (5) of section A of this rule, all other papers and records may be destroyed pursuant to the procedures established in section A.

(3) In Bristol, Middlesex and Suffolk counties, a systematic sample of case papers consisting of 20% (docket numbers ending "0" or "5") for the period from 1860 to 1889, of 10% (docket numbers ending in "0") from 1890 to 1919, and of 5% (docket numbers ending in "00", "20", "40", "60", and "80") for the period from 1920 to 1969 and 2% (docket numbers ending in "00" and "50") after 1969 shall be retained. In the period when law and equity files are separate a 30% (docket numbers ending in "3", "6", and "9") systematic sample of equity files shall be retained. (i.e. Bristol — entered 1897 to June 30, 1974; Middlesex and Suffolk — entered 1892 to June 30, 1974). Except as provided in paragraphs (4) and (5) of section A of this rule all other papers and records may be destroyed pursuant to the procedures established in section A.

(4) All case papers in the following categories not already retained pursuant to the basic sample of paragraphs (1), (2) or (3) shall be retained separately and prominently stamped "Oversample":

(a) Files with a thickness of 11/2 inches or more for the period of 1860 to 1889; 13/4 inches or more for the period of 1890 to 1919; 2 inches or more after 1919. (If flat-filed, one inch or more excluding depositions.)

(b) All files of cases appealed to the Supreme Judicial Court.

(5) Case papers or records in the following categories shall be completely retained:

(a) All records in Barnstable, Dukes, Essex, and Nantucket counties.

(b) All divorce and naturalization records.

(c) All docket books and extended records.

(d) All records in periods when both docket books and extended records are missing.

(e) All records in periods in which there has previously been destruction of some records.

(f) All records prior to 1860.

(g) All records filed in or related to proceedings which have not been finally disposed of for more than twenty years, except that case papers or records may be destroyed, subject to the sampling and other provisions of this rule, ten years after the final disposition of a case provided that the auditor has completed an audit of these papers or records and the clerk certifies to the Administrative Justice of the Superior Court Department that the dockets for any such papers or records to be destroyed contain essential information including entries, in those cases in which counsel is required, indicating representation by counsel or waiver of counsel and including, in civil cases, information sufficient to permit execution on a judgment within twenty years after the date of the judgment. Unless the clerk is otherwise notified, any case which has been pending for twenty or more years shall be deemed to have been finally disposed of for more than twenty years. In any criminal case in which a defendant has been sentenced to more than ten years' imprisonment, the case papers or records shall be retained for a period corresponding to the sentence imposed in that case.

(6) All cases retained pursuant to this rule shall be stamped so as to be clearly visible on the front, "SAMPLED". All containers for such cases shall be labeled so as to be clearly visible on the front, "SAMPLED — SEE SELECTION CRITERIA IN CLERK'S OFFICE." Copies of the selection criteria shall be available in the vault containing records, in the clerk's office, and in the State Archives.

(7) At least thirty days before any papers or records are destroyed, notice that it is proposed to destroy papers or records pursuant to this rule shall have been given to the public by publication in a newspaper of general circulation in the county in which the office of the clerk is located and by posting a copy of such notice in the office of the clerk. The notice need not list specific cases but should identify the types of cases and the beginning and ending dates of the cases to be sampled (e.g. "civil cases 1900 through 1950"). Before publication the notice shall be approved by the Administrative Justice of the Superior Court Department. A copy of such notice shall also be sent to the Chief Justice of the Supreme Judicial Court or his designee, and to the Chief Administrative Justice of the Trial Court.

(8) No papers or records shall be destroyed without an order of the Administrative Justice of the Superior Court Department. Such order may be general in nature as provided for the notice in

paragraph (7) of section A of this rule. Before destroying any papers or records, the clerk shall notify the Administrative Justice of the Superior Court Department of the responses received, if any, as a result of the publication of such notice.

(9) Exceptions from any general description of papers to be destroyed may be made by the clerk or Administrative Justice of the Superior Court Department at any time.

B. District Court, Boston Municipal Court, Juvenile Court and Housing Court Departments. Case papers or records of the District Court, Boston Municipal Court, Juvenile Court and Housing Court Departments under the custody of the clerks of these Departments may be selectively retained pursuant to the following requirements:

(1) A systematic sample of case papers consisting of 5% (docket numbers ending in "00", "20", "40", "60", and "80") for the period from 1800 to 1969 and 2% (docket numbers ending in "00" and "50") after 1969 shall be retained. Except as provided in paragraphs (2), (3), (4), (5), (6), (7) and (8) of section B of this rule, all other papers and records may be destroyed pursuant to the procedures established in section B. If a case included within the 5% or 2% samples has no papers but has a card indicating that it was filed separately or was sent to the Superior Court, the card shall be retained as part of the sampled file.

(2) Case papers with a thickness of at least two inches (one inch, excluding depositions, if flat-filed) shall be retained regardless of whether they are part of the 5% or 2% samples described in paragraph (1). All such cases with a thickness of at least two inches (one inch, excluding depositions, if flat-filed) which are part of the 5% or 2% samples shall be maintained within the numbered sequence of retained sample cases. All other cases with a thickness of at least two inches (one inch, excluding depositions, if flat-filed) shall be retained separately from the main docket number sequence of sampled cases.

(3) All docket books and extended records (if any) shall be retained; and all records in periods when both docket books and extended records (if any) are missing shall also be retained.

(4) All records of any kind bearing date or known to have been filed earlier than the year eighteen hundred shall be retained.

(5) All naturalization and divorce (if any) records, and records of cases, acknowledgements and agreements filed pursuant to G.L. c. 209C shall be retained.

(6) Except as otherwise provided in this paragraph and in paragraphs (7) and (8) of section B of this rule, in order to be eligible for destruction, any case to which the papers relate shall have been finally disposed of for more than twenty years. Case papers or records may be destroyed, subject to the sampling and other provisions of this rule, five years after the final disposition of a case provided that the auditor has completed an audit of these papers or records and the clerk certifies to the Administrative Justice of the appropriate department that the dockets for any such papers or records to be destroyed contain essential information including entries, in those cases in which counsel is required, indicating representation by counsel or waiver of counsel and including, in civil cases, information sufficient to permit execution on a judgment within twenty

years after the date of the judgment. Unless the clerk is otherwise notified, any case which has been pending for twenty or more years shall be deemed to have been finally disposed of for more than twenty years.

(7) All papers filed in or relating to a care and protection case filed pursuant to G.L. c. 119, § 24, shall be retained until the youngest child named on the petition has attained the age of twenty years.

All papers filed in or relating to a child in need of services case filed pursuant to G.L. c. 119, § 39E, shall be retained until five years after the last docket entry, court appearance, order entered or other activity in the case.

All papers filed in or relating to cases filed pursuant to G.L. c. 209, § 32F, G.L. c. 209D, or G.L. c. 273A (repealed by St. 1995, c. 5) in which Massachusetts is the responding State, shall be retained until ten years after the last docket entry, court appearance, order entered or other activity in the case.

(8) The following papers are not subject to the 5% or 2% sampling provisions of paragraph (1) of section B of this rule nor to the twenty year requirement of paragraph (6) of section B of this rule:

Any papers filed in or relating to a proceeding involving the alleged violation of laws, rules or regulations relating to civil motor vehicle infractions, motor vehicle parking, littering, bicycles, pedestrians, municipal dog control, or the decriminalized disposition of municipal ordinance or by-law violations or other decriminalized regulatory offenses may be destroyed two years after the final disposition of such a case provided that the auditor has completed an audit of these papers.

A sample of the types of case papers listed in this paragraph (8) shall be retained by the random selection of twenty of each type of case paper for each year of records to be destroyed.

(9) All cases retained pursuant to this order shall be stamped so as to be clearly visible on the front, “SAMPLED”. All containers for such cases shall be labeled so as to be clearly visible on the front, “SAMPLED — SEE SELECTION CRITERIA IN CLERK’S OFFICE.” Copies of the selection criteria shall be available in the vault containing the records, in the clerk’s office, and in the State Archives.

(10) At least thirty days before any papers or records are destroyed, notice that it is proposed to destroy papers or records pursuant to this rule shall have been given to the public by publication in a newspaper of general circulation in the county in which the office of the clerk is located and by posting a copy of such notice in the office of the clerk. The notice need not list specific cases but should identify the types of cases and the beginning and ending dates of the cases to be sampled (e.g. civil cases, 1900 through 1950). Before publication, the notice shall be approved by the presiding justice of the division, if any, in which the papers or records are stored and by the Administrative Justice of that Department. A copy of such notice shall be sent to the Chief

Justice of the Supreme Judicial Court or his designee and to the Chief Administrative Justice of the Trial Court.

(11) No papers or records of the District Court, Juvenile Court or Housing Court Departments shall be destroyed without an order, approved by the Administrative Justice of the Department, of the presiding justice of the division in which the papers or records are stored. No papers or records of the Boston Municipal Court Department shall be destroyed without an order of the Administrative Justice of that Department. Such orders may be general in nature, as provided for the notice in paragraph (10) of section B of this rule. Before destroying any papers or records, the clerk shall notify the presiding justice of the division, if any, and the Administrative Justice of that Department of the responses received as a result of the publication of such notice.

(12) Exceptions from any general description of papers to be destroyed may be made by the presiding justice, clerk or Administrative Justice at any time.

C. Land Court Department. Case papers or records of the Land Court Department under the custody of the Recorder may be selectively retained pursuant to the following requirements:

(1) A systematic sample of case papers in all miscellaneous cases within the Land Court's jurisdiction, other than proceedings for authority to foreclose a mortgage pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act, of 5% (every twentieth case) for the period prior to 1970 and 2% (every fiftieth case) after 1969 shall be retained. Case papers with a thickness of at least five inches, (three inches excluding depositions, if flat-filed) shall be retained regardless of whether they are part of the 5% or 2% samples, within the numbered sequence of retained sample cases. Except as provided in paragraphs (1), (2), (4), and (5), all remaining case papers in all other cases relating to miscellaneous Land Court jurisdiction may be destroyed after the expiration of twenty years from the date of final disposition. Case papers or records may be destroyed, subject to the sampling and other provisions of this rule, ten years after the final disposition of a case provided that the auditor has completed an audit of these papers or records and the Recorder certifies to the Administrative Justice of the Land Court Department that the dockets for any such papers or records to be destroyed contain essential information including information sufficient to permit execution on a judgment within twenty years after the date of the judgment. Unless the Recorder is otherwise notified, any case which has been pending for twenty or more years shall be deemed to have been finally disposed of for more than twenty years.

(2) Any papers filed in proceedings for authority to foreclose a mortgage pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act are not subject to the 5% and 2% sampling provisions of paragraph (1) nor to the twenty year requirement thereof. Such papers may be destroyed five years after the final disposition of such a case, provided that the auditor has completed an audit of these papers. A sample of the type of case papers listed in this paragraph (2) shall be retained by the random selection of twenty case papers for each year of records to be destroyed.

(3) All registration case papers, abstracts, plans and subsequent proceedings to registration shall be retained. All case papers relating to the foreclosure of the right of redemption pursuant to G.L. c. 60, § 65 (tax), shall be retained.

(4) All cases appealed to the Supreme Judicial Court or Appeals Court shall be retained.

(5) All docket books and extended records (if any) shall be retained; and all records in periods when both docket books and extended records, if any, are missing shall also be retained.

(6) At least thirty days before any papers or records are destroyed, notice that it is proposed to destroy papers or records pursuant to this rule shall be given to the public by publication in a newspaper published in Suffolk County and by posting a copy of such notice in the office of the Recorder. The notice need not list specific cases, but should identify the types of cases and the beginning and ending dates of the cases to be sampled. Before publication, the notice shall be approved by the Administrative Justice of the Land Court Department. A copy of such notice shall also be sent to the Chief Justice of the Supreme Judicial Court or his designee and to the Chief Administrative Justice of the Trial Court.

(7) No papers or records of the Land Court Department shall be destroyed without an order approved by the Administrative Justice of the Land Court Department. Such order may be general in nature as provided for the notice in paragraph (6) of section C of this rule. Before destroying any papers or records, the Recorder shall notify the Administrative Justice of the Land Court Department of the responses received, if any, as a result of the publication of such notice.

(8) Exceptions from any general description of papers to be destroyed may be made by the Administrative Justice or the Recorder at any time.

D. Probate and Family Court Department.

(1) Except as otherwise provided under this rule, case papers or records filed in or related to cases in the Probate and Family Court Department which have been finally disposed of for more than twenty years, and in which microimage copies have been made pursuant to Section E(1) of this rule, may be destroyed under the procedures established in Section D of this rule.

(2) The following types of documents may be destroyed under this rule without the need for a microimage copy:

(a) Guardian ad litem reports, including those of Family Service;

(b) Fiduciary account subsidiary schedules, but not cover pages, twenty years after allowance of the account in question;

(c) Financial statements filed under Rule 401 of the Supplemental Probate Court Rules;

(d) Transcripts of proceedings pursuant to Section E(3) of this rule.

(3) Case papers or records in the following categories shall be retained:

(a) All docket entries and record books;

(b) All records in periods when both docket entries and extended records are missing;

(c) All records prior to 1900;

(d) All case papers or records in any cases appealed to the Supreme Judicial Court;

(e) All probate case papers or records, except as enumerated in paragraphs (1) and (2) of Section D;

(f) All adoption case papers or records.

(4) At least thirty days before any papers or records are destroyed, notice that it is proposed to destroy papers or records pursuant to this rule shall have been given to the public by publication in a newspaper of general circulation in the county in which the office of the register is located and by posting a copy of such notice in the office of the register. The notice need not list specific cases but should identify the types of cases and the beginning and ending dates of the cases to be destroyed (e.g. "divorce cases 1923 through 1950"). Before publication, the notice shall be approved by the Administrative Justice of the Probate and Family Court Department. A copy of such notice shall also be sent to the Chief Justice of the Supreme Judicial Court or his designee, and to the Chief Administrative Justice of the Trial Court.

(5) No papers or records shall be destroyed without an order of the Administrative Justice of the Probate and Family Court Department. Such order may be general in nature as provided for the notice in paragraph (4) of Section D of this rule. Before destroying any papers or records, the register shall notify the Administrative Justice of the Probate and Family Court Department of the responses received, if any, as a result of the publication of such notice.

(6) Exceptions from any general description of papers to be destroyed may be made by the register or Administrative Justice of the Probate and Family Court Department at any time.

E. General Provisions.

(1) With the exception of the case papers or records which must be retained pursuant to Section E(2) of this rule, all case papers or records subject to this rule may be destroyed after final disposition of the case if an approved process of microimaging the case papers or records has been completed. The process of microimaging, the storage of the microimages, and the destruction of papers and records shall be in accordance with procedures established by the Administrative Justice of the Department and approved by the Chief Administrative Justice of the Trial Court. All microform copies must be consistent with the "Standards and Procedures for the Production of Microform Copies of Court Records" established pursuant to the order of the Supreme Judicial Court of July 28, 1987.

(2) All case papers and records in the following categories must be retained in their original form even if microform copies are available:

(a) All docket books and extended records;

(b) All records, except probate records, prior to 1860;

(c) Probate records listed in Section D(3) of this rule.

(3) Transcripts of proceedings may be destroyed two years after the final disposition of the case; provided, however, that if the case was decided by the Supreme Judicial Court, the transcript, or a microform copy of the transcript, shall be permanently retained.

(4) Irrespective of any other provision of this rule, upon final disposition of a case any excess papers, such as transmittal letters and duplicate copies, may be destroyed. The process of disposing of excess papers shall be within the discretion of the clerk, register, or recorder, as appropriate.

1:12 Rule Relative to the Disposal of Stenograpic Notes of Testimony Taken in the Courts of the Commonwealth.

G.L. c. 221, § 27A, as amended.

Stenographic notes of testimony made in any court of the Commonwealth in accordance with any provisions of law may be destroyed by the lawful custodian thereof after the expiration of six years from the date when such notes were taken; provided, however, that this rule shall not apply to notes of which a transcript shall have been ordered and not completed, or to notes as to which the court in which they were taken shall otherwise order.

1:13 Time for Report of Material Facts in the Probate and Family Court Department for Cases Under G.L. c. 215, § 11.

When, in accordance with G.L. c. 215, § 11, a judge of a division of the Probate and Family Court Department has been requested to report the material facts found by him, he shall report such facts within thirty days after the request is made.

1:14 Interest on Pecuniary Legacies and Trust Distributions Under G.L. c. 197, § 20.

(1) Unless otherwise provided in the will or trust instrument, the rate of interest upon pecuniary legacies or pecuniary distributions under a trust instrument to which the provisions of General Laws Chapter 197, Section 20 are applicable shall be eight percent per annum.

(2) The rate of interest provided for by this rule shall be applied in computing interest which becomes payable on or after the effective date of this rule. In a case where interest becomes payable prior to the effective date of this rule and the pecuniary legacy or pecuniary trust

distribution remains unpaid on such date, interest shall be computed up to such date at four percent and shall be computed from and after such date at the rate provided for by this rule.

(3) This rule shall take effect on July 1, 1980.

1:15 Impoundment Procedure.

(Applicable to the Supreme Judicial Court and Appeals Court)

Section 1. Requests for Impoundment in Appellate Courts.

Requests for impoundment in proceedings in the Supreme Judicial Court and the Appeals Court shall be governed by the provisions of Trial Court Rule VIII with the following exceptions: This rule, and Trial Court Rule VIII when used in conjunction with this rule, shall govern impoundment in both civil and criminal proceedings. The term "clerk" shall mean the Clerk of the Supreme Judicial Court for the Commonwealth, the Clerk of the Supreme Judicial Court for Suffolk County, the Clerk of the Appeals Court and their assistants. Hearings, if any, on requests under this rule shall be scheduled by the court.

Section 2. Maintaining Confidentiality of Impounded Material in Cases on Appeal.

(a) Duties of Trial Court Clerks. When an appeal has been taken in a case in which material has been impounded, the clerk of the trial court shall notify the clerk of the appellate court, in writing, at the time of the transmission of the record that material was impounded by the trial court. Such notification shall specify those papers, documents or exhibits, or portions thereof, which were impounded below and shall include a copy of the order of impoundment, if any, or a reference to other authority for the impoundment.

(b) Duties of Appellate Court Clerk. Unless otherwise ordered by the appellate court, or otherwise provided in the trial court order of impoundment, material impounded in the trial court shall remain impounded in the appellate court. The clerk shall keep all impounded material separate from other papers in the case and unavailable for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case and the clerk, unless otherwise ordered by the court.

(c) Duties of the Parties. When an appeal has been taken in a case in which material has been impounded, the parties shall protect the confidentiality of the impounded material. Unless it is necessary to do so, the parties shall not include impounded information in briefs and appendices filed with the court. During oral argument in public sessions the parties shall not disclose impounded material, provided that in cases where such disclosure is necessary the parties shall notify the clerk in advance and shall, in appropriate cases, make such disclosures in a manner which protects the confidentiality of the parties.

If material filed with the court contains impounded information, the parties shall so notify the clerk and shall identify the impounded material, which shall be unavailable for public inspection.

Committee Note

Supreme Judicial Court Rule 1:15 establishes procedures for requests for impoundment in the Supreme Judicial Court and the Appeals Court. It applies to proceedings before the single justices, panels, and the full courts of both appellate courts. Subject to the exceptions stated in Section 1, the rule incorporates by reference the provisions of Trial Court Rule VIII. Although Trial Court Rule VIII applies only to civil proceedings, S.J.C. Rule 1:15 covers both civil and criminal cases. It should also be noted that Trial Court Rule VIII is generally inapplicable to records which are required to be impounded by statute, court rule, or standing order. See, e.g., G.L. c.112, § 12S, G.L. c.119, § 38, G.L. c. 210, §§ 3, 5C, G.L. c. 233, § 20E and Mass. R. Civ. P. 26(c).

Section 2 of the rule states the duties of the trial court clerks, appellate court clerks, and the parties with reference to maintaining the confidentiality of impounded material in cases on appeal. Rule 2(c) requires that the parties protect the confidentiality of such impounded material. In order to maximize the openness of proceedings, the Committee anticipates that, when possible, briefs and appendices will not disclose impounded information and will thereby become available to the public. Also, during oral argument in open court, parties should not disclose impounded information. If impounded material must be discussed in argument, the parties shall advise the clerk in advance. In briefs, appendices and oral argument, parties should attempt to use descriptive terms (e.g. "mother," "child," "foster parents") when referring to confidential material.

A new Rule 12 is added to Trial Court Rule VIII in order to provide a cross-reference between Trial Court Rule VIII and S.J.C. Rule 1:15. It is expected that review of impoundment orders often will be pursuant to G.L. c.231, § 118 or a report by the Trial Court.

[Editor's note: The foregoing note was prepared by the Committee on Appellate Impoundment.]

1:16 Judicial Performance Enhancement Programs.

Section 1. Confidentiality.

Except as provided in section 2 of this rule, any written, recorded, or oral data, information and materials received or developed under a judicial performance enhancement program shall be confidential and shall not be disclosed. The identity of individuals who furnish information concerning judges under a program shall be confidential and shall not be disclosed.

Section 2. Disclosure.

(a) Information concerning an individual judge may be disclosed to that judge, to that judge's chief justice or administrative justice, to the Chief Administrative Justice, and to the judges supervising the judicial performance enhancement program, provided that it is presented in a manner that will not disclose the identity of any person furnishing any information.

(b) From time to time, the Supreme Judicial Court, or the supervisory committee may issue public statements or reports describing the judicial performance enhancement programs and the procedures used in such programs, and summarizing information compiled under such programs, provided that such statements and reports shall not identify, directly or indirectly, any individual judge or any person who furnished information concerning a judge or judges under a program.

1:17 Subpoenas to Officials of the Supreme Judicial Court and Appeals Court.

(1) Subpoenas to compel the testimony of a justice or clerk or assistant clerk of the Supreme Judicial Court or Appeals Court shall be governed by the provisions of Rule 1 of Trial Court Rule IX.

(2) Subpoenas to compel the production of court records or administrative records of a clerk, assistant clerk or other official keeper of records in the Supreme Judicial Court or Appeals Court shall be governed by the provisions of Rule 2 of Trial Court Rule IX.

(3) For purposes of this rule, the term "justice," as used in Trial Court Rule IX, shall mean a judge of the Supreme Judicial Court or Appeals Court; the terms "magistrate" or "clerk-magistrate," as used in Trial Court Rule IX, shall mean the Clerk of the Supreme Judicial Court for the Commonwealth, the Clerk of the Supreme Judicial Court for Suffolk County, the Clerk of the Appeals Court, and their employees.

1:18 Uniform Rules on Dispute Resolution

Rule 1 Court Connected Dispute Resolution

(a) Scope, Applicability and Purpose of Rules. These rules govern court-connected dispute resolution services provided in civil and criminal cases in every department of the Trial Court. The Ethical Standards in Rule 9 also apply to neutrals who provide court-connected dispute resolution services in the Supreme Judicial Court and the Appeals Court. The purpose of the rules is to increase access to court-connected dispute resolution services, to ensure that these services meet standards of quality and procedural fairness, and to foster innovation in the delivery of these services. The rules shall be construed so as to secure those ends. To the extent that there is any conflict between these rules and the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Criminal Procedure, the Massachusetts Rules of Appellate Procedure, the Massachusetts Rules of Domestic Relations Procedure, the Juvenile Court Rules, the Standards and Forms For Probation Offices of the Probate and Family Court Department (hereinafter the "Probation Standards") promulgated by the Office of the Commissioner of Probation effective July 1, 1994, or the Rules of the Supreme Judicial Court and the Appeals Court, then the Massachusetts Rules of Civil, Criminal, Appellate, and Domestic Relations Procedure, the Juvenile Court Rules, the Probation Standards, or the Supreme Judicial Court and Appeals Court rules shall control. The Supreme Judicial Court, the Appeals Court, the Chief Justice for Administration and Management, and each Trial Court department may adopt additional rules or administrative procedures to supplement these rules, provided that they are consistent with these rules.

(b) Guiding Principles. The interpretation of these rules shall be guided by the following principles:

(i) Quality. The judiciary, collaborating with others experienced in dispute resolution, is responsible for assuring the high quality of the dispute resolution services to which it refers the public.

(ii) Integrity. Dispute resolution services should be provided in accordance with ethical standards and with the best interest of the disputants as the paramount criterion.

(iii) Accessibility. Dispute resolution services should be available to all members of the public regardless of their ability to pay.

(iv) Informed choice of process and provider. Wherever appropriate, people should be given a choice of dispute resolution processes and providers and information upon which to base the choice.

(v) Self-determination. Wherever appropriate, people should be allowed to decide upon the issues to be discussed during a dispute resolution process, and to decide the terms of their agreements.

(vi) Timely services. Dispute resolution services, to be most effective, should be available early in the course of a dispute.

(vii) Diversity. The policies, procedures and providers of dispute resolution services should reflect the diverse needs and background of the public.

(viii) Qualification of neutrals. Dispute resolution services should be performed only by qualified neutrals. There are many ways in which a neutral may become competent, and there are many ways to determine qualifications of neutrals, such as assessing performance and considering a neutral's education, training, experience and subject matter expertise.

Rule 2 Definitions.

As used in these rules, the following terms shall have the following meanings:

"Arbitration" means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.

"Case evaluation" means a process in which the parties or their attorneys present a summary of their cases to a neutral who renders a non-binding opinion of the settlement value of the case and/or a non-binding prediction of the likely outcome if the case is adjudicated.

"Clerk" means the clerk, clerk-magistrate, recorder, or register of a court, or a designated assistant clerk-magistrate, assistant recorder or assistant register of probate.

"Community mediation program" means a non-profit, charitable program whose goals are to promote the use of mediation and related conflict resolution services by volunteers to resolve disputes including those that come to, or might otherwise come to, the courts.

"Conciliation" means a process in which a neutral assists parties to settle a case by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and, if the case is not settled, explores the steps which remain to prepare the case for trial.

"Court" means the Land Court, the Boston Municipal Court, or a division of the District Court, the Superior Court, the Probate and Family Court, the Housing Court or the Juvenile Court. The provisions of these rules addressed to courts shall apply to judges, clerks, probation officers and other employees of these courts. For the purposes of Rule 9, "court" also includes the appellate courts.

"Court-connected dispute resolution services" means dispute resolution services provided as the result of a referral by a court. "To refer," for purposes of this definition, means to provide a party to a case with the name of one or more dispute resolution services providers or to direct a party to a particular dispute resolution service provider.

"Dispute intervention" means a process used in the Probate and Family Court and in the Housing Court in which a neutral identifies the areas of dispute between the parties, and assists in the resolution of differences.

"Dispute resolution service" means any process in which an impartial third party is engaged to assist in the process of settling a case or otherwise disposing of a case without a trial, including arbitration, mediation, case evaluation, conciliation, dispute intervention, early neutral evaluation, mini-trial, summary jury trial, any combination of these processes, and any comparable process determined by the Chief Justice for Administration and Management of the Trial Court or the Supreme Judicial Court to be subject to these rules. The term "dispute resolution service" does not include a pretrial conference, an early intervention event, a screening, a trial, or an investigation.

"Early intervention" means a compulsory, judicially supervised event, early in the life of a case, with multiple objectives relating to both scheduling of litigation and selection of dispute resolution services.

"Early neutral evaluation" means case evaluation which occurs early in the life of a dispute.

"Immediate family" means the individual's spouse, domestic partner, guardian, ward, parents, children, and siblings.

"Mediation" means a voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties.

"Mini-trial" means a two-step process to facilitate settlement in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a neutral in the presence of individuals with decision-making authority for each party, and (b) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

"Neutral" means an individual engaged as an impartial third party to provide dispute resolution services and includes but is not limited to a mediator, an arbitrator, a case evaluator, and a conciliator. "Neutral" also includes a master, clerk, clerk-magistrate, register, recorder, family service officer, housing specialist, probation officer, and any other court employee when that individual is engaged as an impartial third party to provide dispute resolution services. For purposes of Rule 9, "neutral" also means an administrator of a program providing court-connected dispute resolution services.

"Program" means an organization with which neutrals are affiliated, through membership on a roster or a similar relationship, which administers, provides and monitors dispute resolution services. A program may be operated by a court employee or by an organization independent of the court, including a corporation or a governmental agency. A program operated by a court employee may include one or more court employees or non-employees or a combination of court employees and non-employees on its roster.

"Provider" or "provider of dispute resolution services" means a program which provides dispute resolution services or a neutral who provides dispute resolution services.

"Screening" means an orientation session in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate, and, if so, to which one. In a screening, there may also be discussion to narrow the issues in the case, to set discovery parameters, or to address other case management issues.

"Summary jury trial" means a non-binding determination administered by the court in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a six-person jury chosen from the court's jury pool, (b) the jury deliberates and returns a non-binding decision on the issues in dispute, (c) the attorneys may discuss with the jurors their reaction to the evidence and reasons for the verdict, and (d) the presiding neutral may be available to conduct a mediation with the parties.

Commentary

"Court-connected dispute resolution services." This definition does not alter the fact that parties are free on their own initiative to obtain dispute resolution services which are not court-connected.

"Neutral." Judges are not included under the term "neutral" in this section because there are other provisions and rules which apply to the functions of judges.

Rule 3 Administrative Structure for Court-Connected Dispute Resolution Services.

(a) Appointment of Standing Committee on Dispute Resolution. There shall be a Standing Committee on Dispute Resolution consisting of up to twenty persons appointed by the Chief Justice for Administration and Management in consultation with the Chief Justices of the Trial Court departments. Each department of the Trial Court shall be represented on the Standing Committee. Members shall be appointed for three year terms and may be reappointed for additional terms when their terms expire. The Standing Committee shall be composed of: judges; other court personnel; attorneys; members of the public; academics; and providers of dispute

resolution services. In order to achieve diversity in the membership of the Standing Committee, the Trial Court shall attempt to make funds available for expenses associated with participation in the Committee.

(b) Duties of Standing Committee on Dispute Resolution. The Standing Committee shall advise the Chief Justice for Administration and Management of the Trial Court with respect to standards for court-connected dispute resolution services and the implementation and oversight of court-connected dispute resolution services throughout the Trial Court. The Standing Committee shall work to ensure access to court-connected dispute resolution services, to ensure the quality of the services, and to foster innovation in the delivery of the services.

(c) Trial Court Departments. The Chief Justice of each Trial Court department may appoint an advisory committee on that department's court-connected dispute resolution services composed of judges, other court personnel, attorneys, academics, members of the public, and providers of dispute resolution services, including representatives of community mediation programs where they provide services to that court department. In order to achieve diversity in the membership of an advisory committee, the court shall attempt to make funds available for expenses associated with participation in the committee. An advisory committee shall function so as to avoid conflict of interest or the appearance of conflict of interest. Each such Chief Justice may designate an employee as the department coordinator of court-connected dispute resolution services. Every Trial Court chief justice who approves dispute resolution programs pursuant to Rule 4(a) shall develop written policies and procedures governing program operations and record-keeping that will enable evaluation of the program.

(d) Local Dispute Resolution Services Coordinator. The First Justice or the justice with administrative supervision of each court or division within every Trial Court department shall designate one court staff member as the dispute resolution services coordinator for that court or division. By agreement of affected First Justices, one person may be designated as dispute resolution services coordinator for divisions or courts in more than one department which are located in the same or a nearby building. The dispute resolution services coordinator shall maintain information about court-connected dispute resolution services and assist the public in making informed choices about the use of those services. The coordinator, in collaboration with the program or programs to which the court division refers cases, shall develop a system to record and compile data as required by Rule 6(g).

(e) Technical Assistance for Implementation of Dispute Resolution Services. The Chief Justice for Administration and Management shall, subject to appropriation, provide advice and consultation to Trial Court departments, courts, advisory committees and designated dispute resolution staff to assist in developing and operating court-connected dispute resolution services in accordance with the rules.

Rule 4 Implementation of Court-Connected Dispute Resolution.

(a) Development of List of Approved Programs.

(i) The Chief Justice of each Trial Court department, subject to review for compliance by the Chief Justice for Administration and Management, shall approve programs to receive court referrals in accordance with these rules. In order to be approved, programs must: agree to meet the operations standards in Rule 7; agree to ensure that the neutrals on their roster who provide court-connected dispute resolution services meet the qualifications standards in Rule 8; and agree to ensure that the neutrals on their roster follow the ethical standards in Rule 9 when providing court-connected dispute resolution services. The list of approved programs shall be developed and maintained through an open process which includes at least the following: advertisement of the opportunity to apply to be on the list; fair assessment of programs; efforts to ensure diversity among neutrals as to race, gender, ethnicity, experience, and training; policies about the length and termination of participation on the list; and procedures for removing a program from the list for cause and/or as a result of a complaint filed pursuant to Rule 4(f).

(ii) The Chief Justice for Administration and Management shall distribute a combined list of the programs approved pursuant to subparagraph (i). The list shall include information as to each program regarding geographic region, fees, and dispute resolution processes; and information as to each program's expertise, including process and subject matter expertise;

(b) Trial Court Department Plans. Each Trial Court department shall develop plans each fiscal year for the use of court-connected dispute resolution services by the courts in the department. The Chief Justice shall develop the plan in consultation with the department advisory committee, the department coordinator of court-connected dispute resolution services, and the courts in the department. Services may be provided only by programs on the list developed pursuant to paragraph (a) of Rule 4. The plan shall set forth information about court-connected dispute resolution services in the department, including at least the following: current status, goals and objectives, plans for the coming year, any plans for collaborating with other departments, a budget request, case selection and screening criteria, plans for early intervention, and needs for education programs. Where appropriate, each portion of the plan shall address: plans with respect to access to dispute resolution services, the quality of the services, and efforts to foster innovation in the delivery of services. Plans shall ensure that court-connected dispute resolution services are available to those who lack the financial resources to pay for the services and those who would not otherwise have access to the services. The plans shall be submitted by September 1 of each year to the Chief Justice for Administration and Management for review and approval.

(c) Pilot Programs for Mandatory Participation in Dispute Resolution Services. Any Trial Court department may propose to the Chief Justice for Administration and Management for review and approval an experimental pilot program which requires parties in civil cases to participate in non-binding forms of dispute resolution services. No Trial Court department shall administer such a pilot program without the approval of the Chief Justice for Administration and Management. Case types not suitable for dispute resolution services should be identified. The pilot program may provide for the mandatory participation of the parties and shall be assessed regularly to control quality. The minimal requirements for mandatory participation shall be as follows:

(i) each party shall be provided with an opportunity to terminate the dispute resolution services, upon motion to the court for good cause shown, but unwillingness to participate shall not be considered good cause;

(ii) the court shall give preference to a dispute resolution process upon which the parties agree;

(iii) the court shall explicitly inform parties that, although they are required to participate, they are not required to settle the case while participating in dispute resolution services; and

(iv) no fees may be charged for mandatory participation in dispute resolution services, but the court may charge fees for elective dispute resolution services.

(d) Funding of Court-connected Dispute Resolution Services. As part of the annual budget requests required by G.L. c. 211B, §10(viii) and (x), the Chief Justice of each Trial Court department shall include a request for funding for court-connected dispute resolution services. The budget request shall provide for the funding of court-connected dispute resolution services for those parties who lack the financial resources to pay for the services or who would not otherwise have access to the services. Funds may be used for approved programs to provide screening and to provide and/or administer the services. Budget requests shall estimate funds needed to maintain previously funded services provided by approved programs. Additional amounts shall be used for the expansion or improvement of services or for innovative services. Expenditures shall be subject to the approval of the Chief Justice for Administration and Management after consultation with the Standing Committee.

(e) Contracts for Court-connected Dispute Resolution Services. (i) If public funds are appropriated or otherwise available and allocated by the Chief Justice for Administration and Management of the Trial Court for contracts with court connected dispute resolution programs, the Chief Justice for Administration and Management, in consultation with First Justices or other justices with administrative responsibility for courts and the Chief Justices of affected departments, shall issue one or more requests for proposals for dispute resolution services to be provided by contracts with approved programs, shall select programs through a competitive bidding process, and shall execute contracts for services on behalf of departments and courts which may extend for no more than three years. These contracts may provide for a program to receive payments approved under paragraph (d) and may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(ii) If public funds are not involved, but courts seek an exclusive arrangement with a program or programs for court-connected dispute resolution services, the Chief Justice of the affected department or his or her designee shall, in consultation with the Chief Justice for Administration and Management, issue one or more requests for proposals to be provided by contracts with approved programs, shall select programs through a competitive process, and, with the approval of the Chief Justice for Administration and Management, shall execute contracts for services on behalf of departments and courts which may extend for no more that three years. These contracts may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(iii) In selecting programs with which to contract, the Chief Justice for Administration and Management, or the Chief Justice of the department, as applicable, is encouraged to give

preference to programs which demonstrate a record of and commitment to maintaining a diverse roster and operating in a manner which is accountable to the community.

(iv) The competitive bidding requirements in this subsection shall not apply to programs in which dispute resolution services are provided exclusively by court employees.

(f) Complaint Mechanism. The Chief Justice for Administration and Management, in consultation with the Chief Justices of the departments and with the advice of the Standing Committee, shall develop a uniform procedure for handling complaints regarding court-connected dispute resolution services.

Commentary

(a) Development of List of Approved Programs. Two Supreme Judicial Court Commissions have recommended measures like those contained in this paragraph and Rule 6(a) to ensure fair access to court appointments. See, Gender Bias Study of the Massachusetts Court System, Supreme Judicial Court, (1989), p.168 and Equal Justice, Commission to Study Racial and Ethnic Bias in the Courts, Supreme Judicial Court, (1994), p.128-129.

(b) Trial Court Department Plans. The department plans are expected to be incremental, starting in the first year with a simple description of current and planned services and funding needs, and becoming gradually more extensive in future years. One desirable feature of department plans would be to aim for a consistent level in the quality and quantity of services in all courts across the state.

The criteria governing case selection should identify any categories of case which the department determines should be routinely excluded from dispute resolution as a matter of policy. For example, some commentators believe that courts should not, without a compelling countervailing reason, refer cases to dispute resolution services when there is a need for public sanctioning of conduct or a public declaration of rights, when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly, or when a party or parties are not able to negotiate effectively themselves or with assistance of counsel.

Trial Court department chief justices should gather sufficient information from courts within the department to oversee the courts' use of dispute resolution services pursuant to the Uniform Rules on Dispute Resolution, and, in addition to or as part of the plans required by this section, should submit reports each year to the Chief Justice for Administration and Management about that department's use of court-connected dispute resolution services. The reports should contain information requested by the Chief Justice for Administration and Management, including (i) a narrative of significant program developments and activities; and (ii) case record information. Program developments and activities should be described with reference to stated goals and objectives, including: accessibility, quality, collaborative activities, new initiatives, unexpected outcomes, and early intervention initiatives. The Chief Justice for Administration and Management should request case record information needed to plan and oversee court-connected dispute resolution services under these rules, including case record information by type of dispute resolution process, such as total numbers of: cases screened, pretrial referrals, types of cases, cases referred, cases which entered a dispute resolution process, cases in which agreement

was reached and not reached, cases in which resolution is pending, referrals made by each court to each approved program, referrals accepted by each program, and cases reviewed by early intervention processes. Each court and program would need to keep records on case record information in order to comply with any such request. See Rule 6(g).

(c) Pilot Programs for Mandatory Participation in Dispute Resolution Services. In designing pilot programs, courts will comply with G.L. c. 209A, §3, which provides that in abuse prevention proceedings, "No court may compel parties to mediate any aspect of their case."

(e) Contracts for Court-connected Dispute Resolution Services. Decisions in the awarding of contracts should not be based solely on cost, but should also reflect values and goals such as responsiveness to the community, the availability of a diverse pool of neutrals, outreach abilities, and the need for variety in referrals. See Rules 6(a) and 7(c) for referral rules affecting programs which are awarded contracts.

(f) Complaint Mechanism. The complaint mechanism should be designed to be accessible and user-friendly. Information about the complaint mechanism should be posted in every courthouse and included in the written information prepared pursuant to Rule 5.

Rule 5 Early Notice of Court-Connected Dispute Resolution Services.

Clerks shall make information about court-connected dispute resolution services available to attorneys and unrepresented parties. This information should state that selection of court-connected dispute resolution services can occur at the early intervention event or sooner, and that no court may compel parties to mediate any aspect of an abuse prevention proceeding under G.L. c. 209A, §3. Insofar as possible, information should be available in the primary language of the parties. Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.

Commentary

Information about the availability of court-connected dispute resolution services should be added to the standard summons form.

Although the rule is limited to civil cases, courts are encouraged to distribute information about court-connected dispute resolution services in appropriate criminal matters, including delinquency cases and hearings on applications for criminal complaints pursuant to G.L. c. 218, §35A.

The information made available by clerks should include a general description of dispute resolution services, an explanation of reasons for choosing whether or not to use these services in different kinds of cases, an enumeration of the services available by referral from the court where the complaint is filed, information designed to ensure that pro se litigants make informed choices about the use of these services, information about the process for filing complaints regarding court-connected dispute resolution services, notice of the right to bring an adviser of one's own choice to a dispute resolution session pursuant to Rule 7(d),and information about the right to an interpreter's services throughout a legal proceeding pursuant to G.L. c. 221C. To the extent possible, courts should also provide pro se

litigants with written information containing answers to frequently asked questions (regarding statutory rights, for example).

Rule 6 Duties of Courts with Respect to Court-Connected Dispute Resolution Services.

(a) Referral of Cases. No court may refer cases to a provider of dispute resolution services unless the provider is an approved program included on the list developed pursuant to Rule 4(a). In all cases, courts shall inform parties that they are free to choose any approved program on the list, subject to such reasonable limitations as the court may impose, or any other provider of dispute resolution services. If the parties are unable or unwilling to choose a program from the list or another provider, a court may make a referral to a specific program on the list in which the court has confidence, whether or not the court has a contract for services with that program. The court shall make a reasonable effort to distribute such specific referrals fairly among programs on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, and fee levels. In the alternative, a court may refer all or most of its cases requiring dispute resolution services to one or more approved programs in which the roster consists exclusively of one or more court employees or with which it has a contract for services pursuant to Rule 4(e). Notwithstanding the foregoing, a court may refer a case to a provider that is not on the list in exceptional circumstances, when special needs of the parties cannot be met by a program on the list. The judge shall report any such referral and the exceptional circumstances which required it to the Chief Justice of the department. In a criminal case, the court shall consult with the prosecuting attorney and obtain the approval of the defendant and, where applicable, the victim, before making a referral to a dispute resolution program.

(b) Screening. In civil cases, courts may require parties and/or their attorneys to attend a screening session or an early intervention event regarding court-connected dispute resolution services except for good cause shown.

(c) Time for Dispute Resolution. A court may establish a deadline for the completion of a court-connected dispute resolution process, which may be extended by the court upon a showing by the parties that continuation of the process is likely to assist in reaching resolution.

(d) Choice. No court shall require parties to participate in dispute resolution services without meeting the minimal requirements set forth in Rule 4(c), except that Probate and Family Courts may require parties to participate in dispute intervention. Except in a case affected by a pilot program under Rule 4(c) or a case involving such a referral to dispute intervention, the court shall inform litigants, both at the time of referral and at the beginning of the dispute resolution process, that the decision to participate in a dispute resolution process is voluntary.

(e) Space for Dispute Resolution Sessions. Courts may, subject to guidelines issued by the Chief Justice for Administration and Management of the Trial Court, provide available courthouse space or other resources for court-connected dispute resolution services provided by approved programs. The space provided shall be sufficiently private and readily accessible. Reasonable accommodation shall be made for disabled individuals.

(f) Communication with Program or Neutral.

(i) The court shall give a program which is providing court-connected dispute resolution services sufficient information to process the case effectively.

(ii) The program shall give the court's administrative staff sufficient case-specific and aggregate information to permit monitoring and evaluation of the services.

(iii) Communication with the court during the dispute resolution process shall be conducted only by the parties or with their consent. The parties may agree, as part of the dispute resolution process, as to the scope of the information which they, the program, or the neutral will provide to the court. Absent an agreement of the parties and subject to the provisions of Rule 9 regarding confidentiality and subparagraph (iv) below, the program or neutral may provide only the following information to the court: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, and the fact that the dispute resolution process has concluded without parties' having reached agreement.

(iv) At the conclusion of conciliation or dispute intervention, the program or neutral may communicate to the court recommendations, a list of those issues which are and are not resolved, and the program's or neutral's assessment that the case will go to trial or settle, provided that the parties are informed at the initiation of the process that such communication may occur.

(g) Data Collection. The court, in collaboration with the approved program or programs to which it refers cases, shall develop a system to record accurately and compile regularly data sufficient to track cases, monitor services, and provide any information required or requested by the applicable Trial Court department chief justice or the Chief Justice for Administration and Management.

(h) Intake and Selection. Every court shall evaluate cases to ensure that they are appropriate for dispute resolution based on the case selection criteria of the applicable department developed pursuant to Rule 4(b).

(i) Inappropriate Pressure to Settle. Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for nonsettlement by the parties. The court shall give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties. In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(j) Sanctions for Failure to Attend Sessions. A court may impose sanctions for failure without good cause to attend a mandatory screening session, an early intervention event, or a scheduled dispute resolution session.

Commentary

(a) Referral of Cases. Parties who are interested in dispute resolution services should be referred to the court's dispute resolution coordinator for assistance in those courts which neither offer a program operated by a court employee nor have a contract with any program, or which have contracts with more than one program.

This paragraph governs court referrals and does not alter the fact that parties may obtain dispute resolution services on their own initiative from a neutral or organization not on the list, consistent with the schedule established by the court.

Courts are encouraged to provide neutrals with information about counsel for indigent persons in civil cases, including information about legal services, lawyer referral services, or volunteer programs such as "lawyer of the day."

ADR has been used successfully by the courts in a wide range of both civil and criminal cases, and in matters that might otherwise become the subject of civil or criminal litigation. The courts should undertake further exploration of the use of ADR in both civil and criminal matters. There are, however, policy reasons which make the use of ADR inappropriate in some cases. See Commentary to Rule 4(b). This paragraph does not limit the discretion of the prosecuting attorney in a criminal case to commence or proceed with the prosecution of the case, nor does it enlarge the limited authority of the court to dismiss a criminal case.

(f) Communication with Program or Neutral. This rule is not intended to remove the evidentiary bar against the admissibility of settlement discussions. In appropriate cases, the court should make the case file available to the neutral. Subparagraph (iv) applies only to the processes of conciliation and dispute intervention, and does not affect other dispute resolution processes.

(g) Data Collection. The court shall make available to the neutral, upon request, information as to whether a case has been referred to the neutral by the court.

(i) Inappropriate Pressure to Settle. Courts and programs should consider the use of checklists or other forms for the gathering of information by the neutral in dispute intervention, in order to aid the neutral in discussing with unrepresented parties relevant factual circumstances and issues which might go unaddressed without such tools. In addition, courts should make their facilities available to "lawyer of the day" programs, to which neutrals or the court can refer unrepresented parties for legal advice.

(j) Sanctions for Failure to Attend Sessions. Sanctions should be imposed only by order of a judge and only in the case of willful failure to attend an event or session.

Rule 7 Duties of Approved Programs with Respect to Court-Connected Dispute Resolution Services.

(a) Program Administration. Programs shall be monitored and evaluated on a regular basis. Settlement rates shall not be the sole criterion for evaluation. Every program shall evaluate its neutrals on a regular basis. Every program shall develop and comply with written policies and procedures governing program administration and operations, including policies regarding evaluation, facilities, communication with the court, data collection, pressure to settle, and intake and selection, which are consistent with policies developed by Trial Court departments pursuant to Rule 3(c) and with Rules 4(a) and 6(a), (e), (f), (g), (h) and (i). A program may refuse to

accept a referral from a court if the case does not meet the program's intake and selection criteria.

(b) Diversity. Programs shall be designed with knowledge of and sensitivity to the diversity of the communities served. The design shall take into consideration such factors as the languages, dispute resolution styles, and ethnic traditions of communities likely to use the services. Programs shall not discriminate against staff, neutrals, volunteers, or clients on the basis of race, color, sex, age, religion, national origin, disability, political beliefs or sexual orientation. Programs shall actively strive to achieve diversity among staff, neutrals, and volunteers.

(c) Rosters. Programs shall (i) assemble, maintain and administer rosters of qualified neutrals in conformity with these rules; (ii) except in the case of programs in which the roster consists exclusively of court employees, make a reasonable effort to distribute referrals fairly among individuals on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, scheduling, and fee levels; (iii) adopt a fair and reasonable method by which qualified individuals may join the roster at its inception, when vacancies occur, or when the caseload requires additional neutrals; and (iv) adopt a fair and reasonable method by which individuals may be removed from the roster, including a provision for a periodic review of the roster. The methods used by the program for adding and removing neutrals shall be set forth in writing and made available to individuals applying for affiliation.

(d) Presence of Advisers. Parties, in consultation with their attorneys, if any, shall be permitted to decide whether their attorney, advocate or other adviser will be present at court-connected dispute resolution sessions.

(e) Fees. Programs may charge fees for service. Parties shall not be charged a fee for attendance at a mandatory screening session or an early intervention event, or for dispute resolution services provided by court employees. Fees charged by a provider of court-connected dispute resolution services shall be approved by the Chief Justice of the applicable court department. The fee schedule shall provide for fee waived or reduced fee services to be made available to indigent and low income litigants. Fees may not be contingent upon the result of the dispute resolution process or the amount of the settlement. Neutrals may assist parties to negotiate an equitable allocation of fees.

(f) Dispute Resolution Sessions. The program shall make reasonable efforts to schedule dispute resolution sessions at the convenience of the parties. The program shall allow adequate time in the dispute resolution session to discuss issues and reach settlement.

(g) Written Agreement. If a settlement is reached, the agreement shall be prepared in writing and signed by the parties, who shall forward for docketing a notice of the disposition of the case to the clerk of the court in which the case is pending. The neutral may participate in the preparation of the written agreement. At the parties' request, the court may allow an oral agreement instead of a written one.

(h) Orientation and Supervision of Neutrals. The program shall ensure that neutrals are familiar with the policies and operations of the court and the program. The program shall supervise its

neutrals. During dispute resolution sessions, newly trained neutrals shall have immediate access to an experienced neutral.

(i) Enforcement of Qualifications Standards and Ethical Standards. Each approved program shall be responsible for enforcing the qualifications standards in Rule 8 and the ethical standards in Rule 9, and for taking appropriate action if a neutral on its roster fails or ceases to meet the qualifications standards or violates the ethical standards. Appropriate actions include referral for further training, suspension from the roster, or removal from the roster. If the Chief Justice of a Trial Court Department directs a program to take such action as a result of a complaint about the neutral and the program refuses to act, the Chief Justice may revoke the program's status as a program approved to receive referrals from that department.

Commentary

(a) Program Administration. Evaluation methods should be designed to incorporate the experiences of disputants.

Rule 8 Qualification Standards for Neutrals.

(a) Purpose and Applicability. The purpose of setting qualifications standards for neutrals who receive court referrals is to foster high quality dispute resolution services. This rule shall apply to neutrals who provide mediation, arbitration, conciliation, case evaluation, dispute intervention, mini-trials or summary jury trials in court-connected programs.

(b) General Provisions.

(i) General Qualifications Requirements. To be qualified to provide dispute resolution services for cases referred by a court to an approved program, a neutral shall satisfy the requirements specified in this rule for the particular process which he or she provides unless exempted pursuant to Rule 8(k). A neutral may meet one or all of these requirements using the alternative method, if any, specified for the particular process, pursuant to Rule 8(j). To remain qualified, neutrals shall satisfy the continuing education and continuing evaluation requirements, if any, specified in this rule for the particular process.

(ii) Additional Qualifications. Trial Court Departments may establish additional qualifications for neutrals in approved programs in addition to those set forth in this rule provided they are consistent with these rules. In establishing such additional standards, court departments may provide for consideration of such factors as an individual's experience as a neutral, educational background, work experience, or subject matter expertise, and may also require such neutrals to complete specialized training or demonstrate subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive criteria by court departments in establishing additional qualifications for mediators or arbitrators participating in approved programs.

(iii) Competence. In qualifying mediators and arbitrators to handle court referrals, approved programs may consider such factors as an individual's experience as a mediator or arbitrator, educational background, work experience and subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive

criteria by approved programs in qualifying mediators and arbitrators for inclusion in court panels. Academic degrees and professional licensure may be used as preclusive criteria for qualifying conciliators, case evaluators, mini-trial neutrals and summary jury trial neutrals.

(iv) Duties of the Chief Justice for Administration and Management. The Chief Justice for Administration and Management (CJAM) shall oversee and monitor the implementation of this rule, and suggest changes as needed. The CJAM shall, in consultation with the Standing Committee, develop guidelines for implementing the provisions of this rule. The CJAM shall collect, publish and distribute to approved programs any changes in the guidelines, and shall maintain the annual certifications submitted by approved programs as to the training, evaluation, mentoring and continuing education of neutrals.

(v) Duties of Approved Programs. Each approved program shall ensure that the neutrals on its roster meet the applicable training, mentoring, evaluation, continuing education, continuing evaluation, professional and experience requirements set forth in this rule and the guidelines adopted pursuant to Rule 8(b)(iv), and any additional qualification requirements adopted by a Trial Court Department. Each approved program shall ensure that the neutrals meet the standards set forth in the rule and guidelines, that any alternative method relied upon by a neutral to meet the standards is in compliance with Rule 8(j) and the guidelines, and that reliance upon the limited exemption is in compliance with Rule 8(k). To carry out these duties, each program shall take the following specific actions:

(a) Attest in its application for program approval that it will assign cases referred by a court only to neutrals who meet the qualifications standards;

(b) Maintain for the tenure of the neutral's association with the program, and for three years thereafter, documentation which demonstrates that the neutral meets the qualifications standards. Such documentation shall include, without limitation, the following:

(i) Name of the neutral;

(ii) Name of the training organization where the neutral satisfactorily completed any required training (or documentation of the neutral's compliance with the alternative method of meeting any training requirement pursuant to Rule 8(j));

(iii) Outcome of any required mentoring and evaluation for each neutral (or documentation of the neutral's compliance with the alternative method of meeting any evaluation requirement pursuant to Rule 8(j));

(iv) Documentation of the neutral's participation in any required continuing education and in any required continuing evaluation;

(v) Documentation demonstrating that the neutral meets any applicable requirements as to professional licensure, experience or subject matter expertise; and

(vi) Documentation demonstrating that the neutral qualifies for the limited exemption set forth in Rule 8(k).

(c) Certify annually to the AOTC that the neutrals on its roster meet the requirements for training, mentoring and evaluation, and continuing education set forth in this rule and the guidelines.

(d) Make the documentation demonstrating a neutral's qualification and the documentation demonstrating the program's compliance with the rules and the guidelines available to the AOTC and to the Chief Justices of the Trial Court Departments for inspection and copying upon request.

(c) Mediators.

(i) Training Requirement. A mediator shall successfully complete a basic mediation training course of at least thirty hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A mediator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement. A mediator shall complete the mentoring and evaluation requirements contained in the Guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. A mediator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. A mediator shall participate in regular evaluation as required by Rule 7.

(d) Arbitrators.

(i) Training Requirement. An arbitrator shall successfully complete a basic arbitration training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8 (b)(iv). An arbitrator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement. An arbitrator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. An arbitrator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. An arbitrator shall participate in regular evaluation as required by Rule 7.

(e) Conciliators.

(i) Professional Qualifications. A conciliator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and have engaged in the practice of law within the Commonwealth of Massachusetts for at least three years.

(ii) Training Requirement. A conciliator shall successfully complete a conciliation training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A conciliator shall also complete any additional, specialized training required by a trial court department.

(iii) Mentoring and Evaluation Requirement. A conciliator shall, if required to do so at the discretion of the approved program with which he or she is affiliated, complete the mentoring and evaluation requirements of that program contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A conciliator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A conciliator shall participate in regular evaluation as required by Rule 7.

(f) Case Evaluators.

(i) Professional Qualifications. A case evaluator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and must have seven years of trial experience within the Commonwealth of Massachusetts as an attorney or judge.

(ii) Training Requirement. A case evaluator shall successfully complete a basic case evaluation training of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A case evaluator shall also complete any additional, specialized training required by a Trial Court Department for case evaluators.

(iii) Mentoring and Evaluation Requirement. A case evaluator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A case evaluator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A case evaluator shall participate in regular evaluation as required by Rule 7.

(g) Mini-Trial Neutrals.

(i) Professional Qualifications. A mini-trial neutral shall have at least ten years experience evaluating legal disputes as a judge, arbitrator, attorney, or executive level decision-maker.

(ii) Training Requirements. A mini-trial neutral shall successfully complete the training required for mediators in Rule 8(c)(i), and the training required for case evaluators in Rule 8(f)(ii).

(iii) Mentoring and Evaluation Requirement. A mini-trial neutral shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A mini-trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A mini-trial neutral shall participate in regular evaluation as required by Rule 7.

(h) Summary Jury Trial Neutrals.

(i) Professional Qualifications. A summary jury trial neutral shall be an arbitrator qualified under this rule, an attorney, or a former judge, with at least ten years of experience as an arbitrator, trial attorney, or judge. The summary jury trial neutral must be in good standing in any jurisdiction in which he or she is licensed to practice law.

(ii) Continuing Education. A summary jury trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iii) Continuing Evaluation. A summary jury trial neutral shall participate in regular evaluation as required by Rule 7.

(i) Dispute Intervention Neutrals.

(i) Training Requirement. A provider of dispute intervention services shall successfully complete a training course and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A provider of dispute resolution services shall also complete any additional specialized training required by the Trial Court Department in which he or she is providing dispute intervention services.

(ii) Mentoring and Evaluation Requirement. A provider of dispute intervention services shall complete the mentoring and evaluation requirements set forth in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. A provider of dispute resolution services shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. A provider of dispute resolution services shall participate in regular evaluation as may be required by the relevant Trial Court Department.

(j) Alternative Methods of Satisfying Requirements. A neutral may be qualified by a program to handle cases referred by a court by demonstrating that he or she meets the alternative methods set forth in the guidelines of satisfying the training, mentoring and evaluation requirements set forth in this rule and the guidelines. Programs that seek to qualify neutrals through the alternative methods provision are required to compile necessary documentation pursuant to Rule 8(b)(v) and applicable guidelines.

(k) Limited Exemption from Training, Mentoring and Evaluation Requirements. As a general rule, all neutrals in approved programs shall satisfy the training, mentoring and evaluation requirements set forth in Rule 8. However, the Chief Justice of any Trial Court Department may elect, as a one-time exception to this rule, to exempt mediators, arbitrators, case evaluators, and conciliators from those requirements, subject to the provisions set forth below. The Chief Justice for Administration and Management shall establish a process for notification and a deadline for submission by departmental Chief Justices of their decision to utilize the exemption, and for programs to apply for the exemption.

(i) One-Time Exemption of Certain Neutrals. This exemption will be a one-time option available only to those mediators, arbitrators, case evaluators and conciliators who meet the requirements set forth in Rule 8(k). No other neutral shall be exempted from the training, mentoring or evaluation requirements of Rule 8.

(ii) Designation of Neutrals. Each program approved on or before July 1, 2002, by a Department in which this exemption is available pursuant to this Rule and which continues as an approved program on the date on which Rule 8 becomes effective shall submit to the Chief Justice of that Department pursuant to the process established by the Chief Justice for Administration and Management, a list of any mediators, arbitrators, case evaluators and conciliators who qualify for the exemption. The program shall include a complete and detailed description of the qualifications of each such mediator, arbitrator, case evaluator or conciliator as evidence of his or her eligibility.

(iii) Requirements for Exemption. A program may consider a neutral eligible for this exemption only if he or she was serving as of July 1, 2002, on a panel of a program approved on or before that date which continues as an approved program on the date on which Rule 8 becomes effective. In addition, a program shall consider the neutral's overall experience and other factors under Rule 8 (e.g. prior training, mentoring, evaluation, the recency of his or her experience and the number and types of cases handled). An eligible individual must have served in the process for which he or she is seeking exemption for five years during the last six years prior to July 1, 2002, and meet the following additional requirement:

(a) Mediators. Must have provided at least 300 hours of mediation during that period.

(b) Arbitrators. Must have provided at least 150 hours of arbitration during that period.

(c) Case Evaluators. Must have provided at least 100 hours of case evaluation during that period.

(d) Conciliators. Must have provided at least 100 hours of conciliation during that period.

(iv) Transferability of Exemption. A mediator, arbitrator, case evaluator or conciliator who qualifies for this exemption in a Trial Court Department shall be qualified to provide services in the process in which he or she is exempted in another approved program within that Department subject to the approval of the other program. A mediator, arbitrator, case evaluator or conciliator who seeks exemption in another Department must meet the exemption through a program approved in that other Department.

(v) Limitations on Exemption. This provision does not exempt any mediator, arbitrator, case evaluator or conciliator from complying with the continuing education and continuing evaluation requirements of Rule 8.

(l) Effective Date. The effective date of this rule shall be January 1, 2005, except that to be qualified to provide dispute intervention, individuals employed by the courts on the effective date of this rule shall have until January 1, 2007 to demonstrate compliance with the requirements set forth in this rule. Employees hired to provide dispute intervention after the effective date of this rule must satisfy all the requirements of this rule within thirty-six (36) months of the date of hire.

Rule 9 Ethical Standards.

(a) Introduction. These Ethical Standards are designed to promote honesty, integrity and impartiality by all neutrals and other individuals involved in providing court-connected dispute resolution services. These standards seek to assure the courts and citizens of the Commonwealth that such services are of the highest quality, and to promote confidence in these dispute resolution services. In addition, these standards are intended as a foundation on which appellate courts and Trial Court departments can build their dispute resolution policies, programs and procedures to best serve the public. These Standards apply to all neutrals as defined in these Standards when they are providing court-connected dispute resolution services for the Trial Court and the appellate courts, including those who are state or other public employees. State and other public employees are subject to the Massachusetts Conflict of Interest Law, M.G.L. c. 268A, and therefore, to the extent that these standards are in any manner inconsistent with M.G.L. c. 268A, the statute shall govern. In addition, to the extent that these standards are in any manner inconsistent with the Standards and Forms For Probation Offices of the Probate and Family Court Department promulgated by the Office of the Commissioner of Probation effective July 1, 1994, the Probation Standards shall govern. All courts providing dispute resolution services and all court-connected dispute resolution programs shall provide the neutrals with a copy of these Ethical Standards. These Standards shall be made a part of all training and educational programs for approved programs, and shall be available to the public.

(b) Impartiality. A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct as well as appearance.

(i) A neutral shall provide dispute resolution services only for those disputes where she or he can be impartial with respect to all of the parties and the subject matter of the dispute.

(ii) If at any time prior to or during the dispute resolution process the neutral is unable to conduct the process in an impartial manner, the neutral shall so inform the parties and shall withdraw from providing services, even if the parties express no objection to the neutral continuing to provide services.

(iii) No neutral or any member of the neutral's immediate family or his or her agent shall request, solicit, receive, or accept any in-kind gifts or any type of compensation other than the court-established fee in connection with any matter coming before the neutral.

(c) Informed Consent. The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.

(i) A neutral shall make every reasonable effort to ensure at every stage of the proceedings that each party understands the dispute resolution process in which he or she is participating. The neutral shall explain (a) the respective responsibilities of the neutral and the parties, and (b) the policies, procedures and guidelines applicable to the process, including circumstances under which the neutral may engage in private communications with one or more of the parties.

(ii) If at any time the neutral believes that any party to the dispute resolution process is unable to understand the process or participate fully in it — whether because of mental impairment, emotional disturbance, intoxication, language barriers, or other reasons — the neutral shall (a) limit the scope of the dispute resolution process in a manner consistent with the party's ability to participate, and/or recommend that the party obtain appropriate assistance in order to continue with the process, or (b) terminate the dispute resolution process.

(iii) Where a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the parties, the neutral shall so inform the party or parties.

(iv) A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.

(v) The neutral shall inform the parties of their right to withdraw from the process at any time and for any reason, except as is provided by law or court rule.

(vi) In mediation, case evaluation, and other processes whose outcome depends upon the agreement of the parties, the neutral shall not coerce the parties in any manner to reach agreement.

(vii) In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(d) Fees. A neutral shall disclose to the parties the fees that will be charged, if any, for the dispute resolution services being provided.

(i) A neutral shall inform each party in a court-connected dispute resolution process in writing, prior to the start of the process, of (a) the fees, if any, that will be charged for the process, (b) if there will be a fee, whether it will be paid to the neutral, court, and/or the program, and (c) whether the parties may apply for a fee-waiver or other reduction of fees.

(ii) If a fee is charged for the dispute resolution process, the neutral shall enter into a written agreement with the parties, before the dispute resolution process begins, stating the fees and time and manner of payment.

(iii) Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.

(iv) Neutrals shall not accept, provide, or promise a fee or other consideration for giving or receiving a referral of any matter.

(v) If the court has established fees for its dispute resolution services, no neutral shall request, solicit, receive, or accept any payment in any amount greater than the court-established fees when providing court-connected dispute resolution services.

(e) Conflict of Interest. A neutral shall disclose to all parties participating in the dispute resolution process all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of conflict. A neutral shall not serve as a neutral in a dispute resolution process after he or she knows of such a conflict, unless the parties, after being informed of the actual or potential conflict, give their consent and the neutral has determined that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral.

(i) As early as possible and throughout the dispute resolution process, the neutral shall disclose to all parties participating in the process, all actual or potential conflicts of interest, including but not limited to the following:

(a) any known current or past personal or professional relationship with any of the parties or their attorneys;

(b) any financial interest, direct or indirect in the subject matter of the dispute or a financial relationship (such as a business association or other financial relationship) with the parties, their attorneys, or immediate family member of any party or their attorney, to the dispute resolution proceeding; and

(c) any other circumstances that could create an appearance of conflict of interest.

(ii) Where the neutral determines that the conflict is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral, the neutral shall withdraw from the process, even if the parties express no objection to the neutral continuing to provide services.

(iii) Where the neutral determines that the conflict is not significant, the neutral shall ask the parties whether they wish the neutral to proceed. The neutral shall obtain consent from all parties before proceeding.

(iv) A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

(a) A neutral shall not use the dispute resolution process to solicit, encourage or otherwise procure future service arrangements with any party.

(b) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter related to the subject of the dispute resolution process.

(c) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter unrelated to the subject of the dispute resolution process for a period of one year, unless the parties to the process consent to such action or representation.

(v) A neutral shall avoid conflicts of interest in recommending the services of other professionals.

(f) Responsibility to Non-Participating Parties. A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.

(i) If a neutral believes that the interests of parties not participating or represented in the process will be affected by actual or potential agreements, the neutral should ask the parties to consider the effects of including or not including the absent parties and/or their representatives in the process. This obligation is particularly important when the interests of children or other individuals who are not able to protect their own interests are involved.

(g) Advertising , Soliciting, or Other Communications by Neutrals. Neutrals shall be truthful in advertising, soliciting, or other communications regarding the provision of dispute resolution services.

(i) A neutral shall not make untruthful or exaggerated claims about the dispute resolution process, its costs and benefits, its outcomes, or the neutral’s qualifications and abilities.

(ii) A neutral shall not make claims of specific results, benefits, outcomes, or promises which imply favor of one side over another.

(h) Confidentiality. A neutral shall maintain the confidentiality of all information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

(i) The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to: the identity of the parties; the nature and substance of the dispute; the neutral's impressions, opinions, and recommendations; notes made by the neutral; statements, documents or other physical evidence disclosed by any participant in the dispute resolution process; and the terms of any settlement, award, or other resolution of the dispute, unless disclosure is required by law or court rule.

(ii) Confidentiality vis-à-vis nonparties. The neutral shall inform the participants in the dispute resolution process that he or she will not voluntarily disclose to any person not participating in the mediation any of the information obtained through the process, unless such disclosure is required by law.

(iii) Confidentiality within mediation. A neutral shall respect the confidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission from the party from whom the information was received.

(iv) Neutrals who are part of a court-connected dispute resolution program may, for purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential information does not extend to individuals outside their program.

(v) Neutrals may, with prior permission from the parties, use information disclosed by the parties in dispute resolution proceedings for research, training, or statistical purposes, provided the materials are adapted so as to remove any identifying information.

(i) Withdrawing from the Dispute Resolution Process. A neutral shall withdraw from the dispute resolution process if continuation of the process would violate any of the Ethical Standards, if the safety of any of the parties would be jeopardized, or if the neutral is unable to provide effective service.

(i) Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.

(ii) A neutral may withdraw from the dispute resolution process if the neutral believes that (a) one or more of the parties is not acting in good faith; (b) the parties' agreement would be illegal or involve the commission of a crime; (c) continuing the dispute resolution process would give rise to an appearance of impropriety; (d) in a process whose outcome depends upon the agreement of the parties, continuing with the process would cause severe harm to a non-

participating party, or the public; and (e) continuing discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.

Commentary

(b) Impartiality. A neutral's obligation is to act on the basis of what he or she subjectively believes may be the appearance of favoritism or bias and also on the basis of what the neutral reasonably believes others would think.

(c) Informed Consent. (i) In arbitration, private communications involving the neutral and less than all of the parties and/or their attorneys concerning the substance of the dispute would be improper unless all parties agree otherwise in advance.

(ii) In making a recommendation that a party obtain assistance, the neutral shall avoid making any disclosure to other parties in the dispute resolution process which would (a) compromise the confidentiality of communications between the neutral and the party in need of assistance, (b) detrimentally affect the interests of the party in need of assistance, or (c) impair the impartiality (or perceived impartiality) of the neutral. In seeking appropriate assistance, neutrals should be aware of parties' right, pursuant to G.L. c. 221C, to interpreter's services throughout a legal proceeding.

(iii) This Standard is ordinarily not applicable in arbitration. See also commentary to previous section.

Courts are encouraged to develop and foster innovative approaches to serving unrepresented parties, such as "lawyers of the day," pro bono panels, lay advocates, information rooms inside the court, assignment of counsel, mediation assistants, substantive written information, the use of volunteer mediators to supplement court employees in busy sessions such as the Boston Housing Court, the use of a different ADR process, substantive checklists, and judicial participation in the review of agreements.

(iv) The provision in this Standard permitting a neutral to use his or her knowledge to inform the parties' deliberations is ordinarily not applicable in arbitration.

(v) In arbitration, the parties may not have the right to withdraw from the proceedings.

(d) Fees. For purposes of this subsection, fees may include the neutral's fees, administrative fees, and related expenses.

(iv) This provision is not intended to prohibit neutrals from paying an administrative or panel membership fee.

(e) Conflict of Interest. (i) Individuals are not prohibited from serving as neutrals for parties for whom they or members of their firm have provided services or are currently providing services as long as full disclosure of the relationship is made and (i) after disclosure (ii) the parties consent to the neutral's serving in the case and (iii) the neutral determines that the conflict is not significant enough to cast doubt on the integrity of the process and the neutral. However, neutrals should be particularly sensitive to the fact that circumstances may arise while serving as a neutral for a party who is currently a client of his or her firm which can give rise to a conflict requiring withdrawal, especially when it involves a matter related to the dispute to which the neutral has been assigned.

(iv) The provisions in this subparagraph do not apply to other individuals with whom the neutral is in business, such as other lawyers in the neutral's firm, or other mental health professionals in a

neutral's group practice, nor do they apply to situations where the neutral has served in the past as a neutral in a dispute resolution process involving any party to the current dispute resolution process. Consent is not waivable in advance of the dispute resolution process, but may be waived after the dispute resolution process. A dispute should be considered "related to" another matter if the facts involved in the dispute resolution process are so germane to the later matter that (a) a party in the earlier matter would be unfairly disadvantaged by the neutral's involvement in the later matter or (b) a party in the later matter would be unfairly disadvantaged by the neutral's involvement in the earlier matter.

(h) Confidentiality. (i) This rule is not applicable to arbitration, in which private communications involving the neutral and less than all of the parties and/or their attorneys would be improper unless all parties agree otherwise in advance.

(iv) Individuals who administer court-connected dispute resolution programs are also bound by these standards. See definition of "neutral" in Rule 2.

(v) Ethical vs. statutory obligations: The provisions in this section concerning confidentiality govern the ethical obligations of the neutral but may not bar compelled disclosure of confidential communications, by means of subpoena or other court process. G. L. c.233, §23C, which governs mediation, may prohibit disclosure of communications made in the course of a mediation (as defined in the statute) even if those communications relate to child abuse or neglect or life threatening situations. Other statutes, such as c.119, §51A (the mandated reporter statute) may also govern the obligation to disclose, or maintain confidentiality of, communications relating to child abuse and neglect.

Agreements: In some cases, the confidentiality protection afforded by G. L. c.233, §23C, requires an agreement to mediate. In other dispute resolution processes (such as arbitration, case evaluation, and conciliation), where there is no statutory protection for confidentiality, it may be desirable for the parties to execute an agreement which provides for confidentiality of the process.

1:19 Electronic Access to the Courts.

1. Covert photography, recording or transmission prohibited. No person shall take any photographs, or make any recording or transmission by electronic means, in any courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization from the judge or magistrate then having immediate supervision over such place.

2. Electronic access by the news media. A judge shall permit photographing or electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public, subject to the limitations of this rule. Subject to the provisions of paragraph (d), the news media shall be permitted to possess and to operate in the courtroom all devices and equipment necessary to such activities. Such devices and equipment include, without limitation, still and video cameras, audio recording or transmitting devices, and portable computers or other electronic devices with communication capabilities.

The "news media" shall include any authorized representative of a news organization that has registered with the Public Information Officer of the Supreme Judicial Court or any individual who is so registered. Registration shall be afforded to organizations that regularly gather,

prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic, and to individuals who regularly perform a similar function, upon certification by the organizations or individuals that they perform such a role and that they will familiarize themselves or their representatives, as the case may be, with the provisions of this rule and will comply with them.

In his or her discretion, a judge may entertain a request to permit electronic access as authorized by this rule to a particular matter over which the judge is presiding by news media that have not registered with the Public Information Officer.

(a) Substantial likelihood of harm. A judge may limit or temporarily suspend such access by the news media if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) Limitations. A judge shall not permit:

(i) photography or electronic recording or transmission of voir dire hearings concerning jurors or prospective jurors.

(ii) electronic recording or transmission of bench and side-bar conferences, conferences between counsel, and conferences between counsel and client; or

(iii) frontal or close-up photography of jurors and prospective jurors.

A judge may impose other limitations necessary to protect the right of any party to a fair trial or the safety and well-being of any party, witness or juror, or to avoid unduly distracting participants or detracting from the dignity and decorum of the proceedings.

If the request is to record multiple cases in a session on the same day, a judge, in his or her discretion, may reasonably restrict the number of cases that are recorded to prevent undue administrative burdens on the court.

(c) Minors and sexual assault victims may not be photographed without the consent of the judge.

(d) Positioning of equipment. All equipment and devices shall be of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Unless the judge permits otherwise for good reason, only one stationary, mechanically silent video camera shall be used in the courtroom for broadcast television, a second mechanically silent video camera shall be used for other media, and, in addition, one silent still camera shall be used in the courtroom at one time. Unless the judge otherwise permits, photographic equipment and its operator shall be in place in a fixed position within the area designated by the judge and remain there so long as the court is in session, and movement shall be kept to a minimum, particularly in jury trials. The operator shall not interrupt a court proceeding with a technical problem.

(e) Advance notice. A judge may require reasonable advance notice from the news media of their request to be present to photograph or electronically record or transmit at a particular session. In the absence of such notice, the judge may refuse to admit them. A judge may defer acting on such a request until the requester has seasonably notified the parties and, during regular business hours, the Bureau Chief or News Editor of the Associated Press, Boston, using the email address of apboston@ap.org A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.

(f) Non-exclusive access. A judge shall not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom. If there are multiple requests to photograph or electronically record the same proceeding, the persons making such requests must make arrangements among themselves for pooling or cooperative use and must do so outside of the courtroom and before the court session without judicial intervention.

(g) Objection by a party. Any party seeking to prevent any of the coverage which is the subject of this rule may move the court for an appropriate order, but shall first deliver electronic notice of the motion during regular business hours to the Bureau Chief or News Editor of the Associated Press, Boston, using the email address of apboston@ap.org as seasonably as the matter permits. The judge shall not hear the motion unless the movant has certified compliance with this paragraph, but compliance shall relieve the movant and the court of any need to postpone hearing the motion and acting on it, unless the judge, as a matter of discretion, continues the hearing.

3. Other recordings. A judge may permit the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record when authorized by law, for other purposes of judicial administration, or for the preparation of materials for educational or ceremonial purposes.

4. Definitions. For purposes of this rule, the term "judge" shall include a magistrate presiding over a proceeding open to the public. The term "minor" shall be defined as a person who has not attained the age of eighteen.

1:20 Address Confidentiality Program.

The purpose of this rule is to allow persons certified by the Secretary of the Commonwealth as program participants under the Address Confidentiality Program, G.L. c. 9A, §§ 1 et seq. to use "substitute addresses" provided in that program in certain court proceedings. The words "address," "program participant and "Secretary" as used in this rule shall have the same meaning as designated for said words in G.L. c 9A, § 1.

This rule shall supersede any court rule, standing order or administrative directive to the contrary.

Any address confidentiality program participant and minor child(ren) residing with the program participant who are listed with the Secretary of the Commonwealth as included within the program, shall be entitled to use the address designated for him or her by the Secretary of the

Commonwealth pursuant to Chapter 9A of the General Laws as his or her address. This address may be used in connection with any civil proceeding that is open to the public, except youthful offender cases, and except as may be ordered by the court, provided that the program participant first submits to the court in which the particular action is pending or is to be filed, an affidavit for use of substitute address on a form provided in this rule. The actual address of the program participant may be used by court personnel in the furtherance of their official duties, but such address shall not be used for purposes of mailing any documents, notices or orders

Any person who submits such an affidavit in connection with a particular action shall have an affirmative duty to notify the court if his or her certification is canceled by the Secretary of the Commonwealth or expires during the pendency of the particular action. Such person shall also file a new affidavit whenever there is a change in the actual address as listed on the affidavit filed with the court. Said affidavit shall be impounded by operation of this rule without any further judicial action. The Clerk, Register, or Recorder shall segregate the impounded affidavit from the other papers and shall not make the information contained therein available to other parties.

AFFIDAVIT FOR USE OF "SUBSTITUTE ADDRESS"

RE: _____ v. _____

Docket Number: _____

Name: _____

Address Designated by Secretary of the Commonwealth as my substitute address:
_____

I hereby swear or affirm that pursuant to Chapter 9A of the General Laws I was certified by the Secretary of the Commonwealth on _____ to participate in the Address Confidentiality Program and that the certification remains in full force and effect. My actual residential address is _____.

The minor children residing with me at that address who are also participants in the Address Confidentiality Program are
_____
____

Signed under the penalties of perjury this _____ day of _____ in the year _____.

_____
Certified Program Participant

NOTICE
As a Program Participant you may use the substitute address provided by the State Secretary of the Commonwealth and need not use your actual address in this court proceeding except as the court may otherwise order. However, you should be aware that

other individuals who know your actual address might use that address in documents filed with the court or during the court proceedings not related to this case. Furthermore, your actual address may appear in case files in other court proceedings not related to this case. You should consider seeking a protective order and/or an order of impoundment of all court documents containing your actual address to protect your safety further.

1:21 Corporate Disclosure Statement on Possible Judicial Conflict of Interest.

(a) Who Must File. In civil and criminal cases in the Trial Court and appellate courts, any nongovernmental corporate party to a proceeding must file a statement identifying all its parent corporations and listing any publicly held corporation that owns 10 percent or more of the party's stock or stating that there is no such corporation. In a criminal case, if an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim and if the victim is a corporation providing the information required by this paragraph.

(b) Time for Filing. The manner of filing the corporate disclosure statement shall be as follows:

(i) Appellate Court. In an appellate court, a party must file an original and nine copies of the statement required in paragraph (a) within 30 days of the entry of the appeal upon the docket. In the single justice session of the Supreme Judicial Court, a party must file in accordance with subparagraph (ii). Even if such statement has already been filed, the party's principal brief must include the statement before the table of contents.

(ii) Trial Court; Civil Case. In a civil case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) with its first appearance, pleading, petition, motion, response or other request. A copy of the statement must also be filed with each contested motion.

(iii) Trial Court; Criminal Case. In a criminal case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) upon the defendant's initial appearance pursuant to Mass. R. Crim. P. 7. A copy of the statement must also be filed with each contested motion.

(c) Supplemental Filing. In any case, a party shall promptly file a supplemental statement upon any change in the information that the statement requires.

1:22 Motions to Recuse.

(a) Any motion seeking to recuse a Justice of this court from a full court case shall be in writing, and shall comply in all respects with Mass.R.A.P. 15(a). The motion shall be filed at or before the time for filing the moving party's brief. The court may allow the filing of a motion to recuse after the filing of the brief if the motion is based on grounds not known, and that reasonably could not have been known, at the time the brief was filed, and provided that the motion is filed as soon as practicable after the alleged ground for recusal becomes known. Late filed motions are strongly discouraged.

(b) If the motion is denied by the Justice whose recusal is sought, the moving party may request review of that ruling by the other Justices, by filing with the clerk, within seven days of the ruling, a written request for review. To facilitate this review, a Justice who denies a motion to recuse is encouraged to provide a brief statement of his or her reasons for the ruling.

The review shall be on the papers, and limited to the information that was before the Justice whose recusal was sought, unless the court requests further information. A party requesting review shall therefore file, along with the request for review, eight copies of the motion to recuse and all material related to the motion that was before the Justice initially, including any supporting or opposing memoranda and affidavits. The Justices reviewing the ruling will act as soon as practicable, and, time permitting, before oral argument or submission of the case on briefs.

(c) This rule applies only to full court cases. Recusal rulings in single justice cases are, and will continue to be, reviewable in the regular course on appeal from any adverse final judgment in the single justice case.

(d) Nothing in this rule is intended to change the substantive law governing recusals.

1:23 Attorney General Approved Modifications of Certain Gift Instruments Under G.L. C. 180A, Section 5(d).

1.0 Administrative Equitable Deviation.
If an institution determines that a restriction contained in a gift instrument on the management, investment or duration of an institutional fund has become impractical or wasteful, impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund, the institution,without application to the court, but with the consent of the Attorney General given in accordance with procedures adopted pursuant to Section 3.0, may modify the restriction. This Section 1.0 shall apply only if the fund subject to the restriction has a total value of seventy five thousand dollars ($75,000) or less, as determined as of the end of the institution's last fiscal year, and has been in existence for twenty (20) years or longer. To the extent practicable, the modification shall be made in accordance with the donor's probable intention.

2.0 Administrative Cy Pres.
If an institution determines that a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund has become unlawful, impracticable, impossible to achieve or wasteful, the institution, without application to the court, but with the consent of the Attorney General given in accordance with procedures adopted pursuant to Section 3.0, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. This Section 2.0 shall apply only if the fund subject to the restriction has a total value of seventy five thousand dollars ($75,000) or less, as determined as of the end of the institution's last fiscal year, and has been in existence for twenty (20) years or longer.

3.0 Attorney General Procedures.
The Attorney General may adopt such requirements, definitions, forms and procedures for granting or withholding consent as are not inconsistent with the forgoing and applicable laws governing charitable funds.

4.0 De Novo Proceedings.
Any institution aggrieved by the decision of the Attorney General may proceed, de novo, under G.L. c. 180A, §§ 5(b) or 5(c).

CHAPTER ONE A : GENERAL RULES PARTIALLY SUPERSEDED BY THE MASSACHUSETTS RULES OF CIVIL PROCEDURE OR THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

1:01A Assignment of Counsel in Noncapital Cases.

[Repealed effective July 1, 1986]

1:02A Depositions and Discovery.

(Applicable to certain civil cases.)

Section 1. Depositions Pending Action.

(a) When Depositions May Be Taken. Any party to an original civil proceeding pending in the Supreme Judicial Court, other than such a proceeding governed by the Massachusetts Rules of Civil Procedure, or to a civil proceeding pending in the Land Court Department, other than such a proceeding governed by the Massachusetts Rules of Civil Procedure, may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence or for both purposes. After service of process the deposition may be taken without leave of court except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff prior to the time allowed the defendant for appearance; or where in an action at law there is no reasonable likelihood that recovery will exceed five thousand dollars if the plaintiff prevails; or in an action at law there has been a hearing before an auditor. The attendance of witnesses may be compelled by the use of summons or subpoena as provided by Section 4(a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Section 4(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The party taking the deposition shall not require the production or submission for inspection of any writing, plan,

recording, model, photograph, or other thing prepared by or for the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Section 7(b) the conclusions of an expert. The deponent may not be examined on or be required to produce for inspection any liability insurance policy or indemnity agreement unless such policy or agreement would be admissible in evidence at the trial of the action.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at trial in the court where the proceeding is pending.

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any court of the United States or of any state has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefore.

(e) Objections to Admissibility. Subject to the provisions of Sections 2(b) and 5(c), objections may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any

reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subsection (d) of this section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Section 2. Persons Before Whom Depositions May Be Taken.

(a) Within the Commonwealth. Within the Commonwealth depositions shall be taken before an officer authorized to administer oaths by the laws of the Commonwealth or the United States, or before a person appointed by the court, in which the proceeding is pending. A person so appointed has the power to administer oaths and take testimony.

(b) Outside the Commonwealth. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, whether by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the state, territory, or country]." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee or partner or associate of such attorney or counsel, or is financially interested in the proceeding.

Section 3. Stipulations Regarding the Taking of Depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like any other depositions.

Section 4. Procedures for Depositions Upon Oral Examination.

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination, at least seven days before the time of the taking of the deposition, shall give notice in writing to every other party to the proceeding and file a copy of the notice in court in the proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party to the proceeding, the court may for cause shown enlarge or shorten the time. A resident of the Commonwealth shall not be required by subpoena to travel a distance of more than fifty miles from his place of residence or from his place of business or employment, unless the court otherwise orders. A nonresident of the Commonwealth may be required by subpoena to attend only within fifty miles from the place within the Commonwealth wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court. The court may regulate at its discretion the time, place and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the proceeding is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the proceeding and their officers or counsel, or that the deposition be sealed and opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression. The court may in its discretion where notice is given of the taking of depositions outside the state and at great distances from the place where the case is to be tried, require the party taking the deposition to pay the traveling expenses of the opposite party and of his attorney where their attendance is reasonably necessary at the taking of said deposition; and where it appears that the witness whose deposition is sought is under the control of the party taking the deposition, the court may require such witness to be brought within the state and his deposition taken there. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. The cost thereof shall be borne by the party taking the deposition, except that the court may for cause shown order the cost of stenographer or transcription equitably apportioned among the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other

objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, any justice of the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Section 5(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the proceeding and marked “Deposition of [here insert name of witness]” and shall promptly deliver or mail it to the clerk of the court in which the proceeding is pending. The parties by stipulation may waive transcription and filing of the deposition.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(4) Upon being filed, the deposition shall be open to inspection unless otherwise ordered by the court.

(g) Failure to Attend or to Serve Summons or Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a summons or subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) Engagements of Counsel. The engagement of counsel at the taking of a deposition shall be recognized to the extent that the court in which the proceeding is pending shall order upon application in writing to the court not less than three days prior to the time for the taking of a deposition.

Section 5. Effect of Errors and Irregularities in Depositions.

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known as could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Section 4 are waived unless a

motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Section 6. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Section 4(b), the court may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Section 1(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, testing, or photographing the property or any designated object or operation thereon within the scope of examination permitted by Section 1(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Section 7. Physical and Mental Examination of Persons.

(a) Order for Examination. In a proceeding in which the mental or physical condition of a party is in controversy, or may affect the conduct of the proceedings, the court in which the proceeding is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings.

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that proceeding or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

Section 8. Refusal to Make Discovery; Consequences.

(a) Refusal to Answer. If a party or other deponent refuses to answer any questions propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply with Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this section requiring him to answer designated questions, or an order made under Section 6 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order under Section 7 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Failure of a Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served

with a proper notice, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the proceeding or any part thereof, or enter a judgment by default against that party.

(d) Expenses Against the Commonwealth. Expenses and attorney's fees are not to be imposed upon the Commonwealth under this section.

Section 9. Costs on Depositions.

The taxing of costs in the taking of depositions shall be subject to the discretion of the court. No costs shall be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the costs of service of summons or subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the costs of transcription or such part thereof as the court may fix.

1:03A Trustee Process.

(Applicable to certain civil cases.)

(1) Availability of Trustee Process. In connection with any personal action or proceeding not governed by the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Domestic Relations Procedure (adopted by the judges of the Probate and Family Court Department), or the District/Municipal Courts Rules of Civil Procedure, trustee process may be used in the manner and to the extent provided by law, but subject to the requirements of this rule, to secure satisfaction of a judgment which the plaintiff may recover, provided, however, that no person shall be adjudged trustee for any amount due from him to the defendant for wages or salary for personal labor or services of the defendant except on a claim that has first been reduced to judgment or otherwise authorized by law; and in no event shall the attachment exceed the limitations prescribed by law.

(2) Necessity of Prior Hearing. No trustee process may be served unless attachment on trustee process for a specified amount has been approved by order of the court. Except as provided in paragraph (8) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the trustee process over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

(3) Procedure. A plaintiff who desires to trustee goods, effects, or credits of the defendant shall file in the court to which the action is returnable the writ, properly completed, the declaration, and a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in paragraph (10) of this rule. Except as provided in paragraph (8) of this rule, a copy of the writ, declaration, motion and supporting affidavit or affidavits, together with notice of hearing thereon, shall be mailed to the defendant by certified mail, return receipt requested, at his last known place of residence, or delivered to

him, seven days (or if the credits to be attached include wages, ten days) at least before the date set for the hearing.

Except as provided in paragraph (7) of this rule, any trustee process shall be served within thirty days after the date of the order approving the attachment. Promptly after the service of the trustee process upon the trustee or trustees, a copy of the trustee process with the officer's endorsement thereon of the date or dates of service shall be mailed to the defendant in the manner provided in paragraph (3).

(4) Appearance of Defendant. Inclusion of a copy of the writ in the notice of hearing shall not constitute personal service of the writ upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment he will not thereby submit himself to the jurisdiction of the court nor waive service of the writ and summons or citation upon him in the manner provided by law.

(5) Answer by Trustee; Subsequent Proceedings. A trustee shall file, but need not serve, his answer, under oath, or signed under the penalties of perjury, within the time prescribed in G.L. c. 246, § 10, unless the court otherwise directs. The answer shall disclose plainly, fully, and particularly what goods, effects or credits, if any, of the defendant were in the hands or possession of the trustee when the trustee process was served upon him. The proceedings after filing of the trustee's answer shall be as provided by law. A trustee's failure to file an answer within the time allowed by this rule shall subject him to default in accordance with law.

(6) Trustee Process in Third-Party Action. Trustee process may be used by a party bringing a third-party action in the same manner as upon an original action.

(7) Subsequent Trustee Process. Either before or after expiration of the applicable period prescribed in paragraph (3) of this rule for serving trustee process, the court may, subject to the provisions of paragraph (8) of this rule, order another or an additional service of the trustee process upon the original trustee. A trustee not named in the original writ may be served subject to the provisions of all paragraphs of this rule, except that if the defendant has previously been served with process the plaintiff need not mail him a copy of the writ; and if the plaintiff has previously filed any motion pursuant to paragraph (3) of this rule, or paragraph (3) of Rule 1:04A, he need not mail the defendant a copy of either the writ or the declaration.

(8) Ex Parte Hearings on Trustee Process. An order approving trustee process for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the trustee process over and above any liability insurance known or reasonably believed to be available, and that either (a) the person of the defendant is not subject to the jurisdiction of the court in the action, or (b) there is a clear danger that the defendant if notified in advance of the attachment on trustee process will withdraw the goods, effects or credits from the hands and possession of the trustee and remove them from the Commonwealth or will conceal them, or (c) there is immediate danger that the defendant will dissipate the credits, or damage or destroy the goods or effects to be attached on trustee process. The motion for an ex parte order shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability

insurance which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action, and shall be supported by affidavit or affidavits meeting the requirements set forth in paragraph (10) of this rule.

(9) Dissolution or Modification of Ex Parte Trustee Process. On two days' notice to the plaintiff, or on such shorter notice as the court may prescribe, a defendant whose goods, effects or credits have been attached on trustee process pursuant to an ex parte order entered under paragraph (8) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, file a motion, supported by affidavit, for the dissolution or modification of the trustee process, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. One day at least before such hearing the plaintiff shall furnish the defendant with a copy of the writ, declaration, motion for the ex parte order, and supporting affidavits. At the hearing the plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(10) Requirements for Affidavits. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief, and, so far as upon information and belief, shall state that he believes this information to be true.

(11) Form of Hearing. At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party).

(12) Definitions. The term "plaintiff" shall include a petitioner; "defendant" shall include a respondent; "writ" shall include a summons or an order of notice in the action or proceeding; "declaration" shall include any initial pleading; and "judgment" shall include an order or decree.

1:04A Attachment.

(Applicable to certain civil cases.)

(1) Availability of Attachment. Real estate, goods, chattels and other property may be attached in any personal action or proceeding, not governed by the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Domestic Relations Procedure (adopted by the judges of the Probate and Family Court Department), or the District/Municipal Courts Rules of Civil Procedure, in the manner and to the extent provided by law but subject to the requirements of this rule.

(2) Necessity of Prior Hearing. No attachment upon an original writ may be made unless such attachment for a specified amount has been approved by a justice of the court to which the writ is returnable. The approval of such justice shall be endorsed upon the writ. Except as provided in paragraph (5) of this rule, such approval may be endorsed only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

(3) Procedure. A plaintiff who desires to attach real estate, goods, chattels or other property of the defendant shall file in the court to which the writ is returnable the writ in the action, properly completed, the declaration, and a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements of paragraph (7) of this rule. The motion shall be marked for hearing and, except as provided in paragraph (5) of this rule, a copy of the writ, declaration, motion, supporting affidavit or affidavits, and a notice of hearing shall be mailed to the defendant by certified mail, return receipt requested, at his last known place of residence, or delivered to him, seven days at least before the date set for hearing. Except as provided in paragraph (9) of this rule, any attachment shall be made within thirty days after the date of the order approving the attachment. Promptly after the attachment is made, a copy of the writ with the officer's endorsement thereon of the date of any attachment shall be mailed to the defendant in the manner provided in paragraph (3).

(4) Appearance of Defendant. Inclusion of a copy of the writ in the notice of hearing shall not constitute personal service of the writ upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment he will not thereby submit himself to the jurisdiction of the court nor waive service of the writ and summons or citation upon him in the manner provided by law.

(5) Ex Parte Approval. Approval of an attachment and endorsement thereof upon the writ may be granted ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment over and above any liability insurance known or reasonably believed to be available, and that either (a) the person of the defendant is not subject to the jurisdiction of the court in the action, or (b) there is a clear danger that the defendant if notified in advance of attachment of his property will remove it from the Commonwealth or conceal or convey it, or (c) there is immediate danger that the defendant will damage, destroy or waste the property to be attached. The motion for such ex parte approval of attachment shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability insurance which he knows or has reason to believe will be available to satisfy any judgment, and shall be supported by affidavit or affidavits meeting the requirements of paragraph (7) of this rule.

(6) Dissolution or Modification of Ex Parte Attachments. On two days' notice to the plaintiff, or on such shorter notice as the court may prescribe, a defendant whose real estate, goods, chattels or other property has been attached upon a writ approved ex parte as provided in paragraph (5) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, and move the dissolution or modification of the attachment. Such motion shall be heard and determined as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding made in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(7) Requirements for Affidavits. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings, and shall be upon the affiant's own knowledge,

information or belief and, so far as upon information and belief, shall state that he believes this information to be true.

(8) Form of Hearing. At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party).

(9) Subsequent Attachment. Property subject to attachment may, during the pendency of the action or proceeding, be attached subject to the provisions of this rule, except that if the defendant has previously been served with process the plaintiff need not mail the defendant a copy of the writ; and if the plaintiff has previously filed any motion pursuant to paragraph (3) of this rule, or paragraph (3) of Rule 1:03A, he need not mail the defendant a copy of either the writ or the declaration or similar pleading.

(10) Definitions. The term "plaintiff" shall include a petitioner; "defendant" shall include a respondent; "writ" shall include a summons or an order of notice in the action or proceeding; "declaration" shall include any initial pleading; and "judgment" shall include an order or decree.

CHAPTER TWO : RULES FOR THE REGULATION OF PRACTICE BEFORE THE SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT

2:01 Fixing Time for Pleadings and Proceedings.

(Applicable to all cases.)

The court in its discretion may order or permit pleadings to be filed, or any act to be done, at other times than are provided in these rules.

Whenever in the progress of any case it becomes necessary that a pleading be filed or other step taken so that the case may proceed, and the matter is not covered by any provision of statute or rule, the court may fix the time for the filing of such pleading or make any other appropriate order.

2:02 Form and Indorsement of Papers.

(Applicable to all cases. See S.J.C. Rule 1:08.)

All papers filed in the county court shall be legibly typed with double spacing. The page shall be eight and three-eighths or eight and one-half inches in width and ten and three-fourths or eleven inches in height. The left hand margin shall be not less than one and three-fourths inches. The right hand margin shall be not less than one inch. Documents shall be bound at the left side only. They shall be filed unfolded except applications for admission to the bar.

All information required by S.J.C. Rule 1:08 shall be indorsed on the paper before filing in the clerk's office.

In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

2:03 Appearances.

(Applicable to criminal cases.)

The name, address, and business telephone number of the attorney for every party, or of the party if no attorney appears for him, shall be entered upon the docket as they appear upon the paper or papers constituting the appearance, or some paper transmitted to the clerk therewith. Where no address of the attorney or party, as the case may be, appears upon the docket, notice to such party may be given by posting the same publicly in the clerk's office or in a room, hall or passage adjacent thereto. The clerk upon request shall post the same.

A substitution of attorneys or change of address or telephone number shall be entered by the clerk upon the docket on written request filed in the particular case. The court and parties, until such substitution or change is entered, and thereafter until the parties have notice thereof, may rely on action by, and notice to, any attorney previously appearing, and on notice at an address previously entered.

Any appearance shall constitute a general appearance unless the purposes thereof are specified in writing.

2:04 Giving Notice.

(Applicable to criminal cases.)

A notice to a party required by or given in pursuance of these rules, or any statute relative to procedure not requiring a different notice, shall be in writing, and, except as otherwise permitted by Rule 2:03, shall be given to such party or his attorney or any of his attorneys by delivering the same personally to him or by mailing the same, postage prepaid, to him at his business address or the address entered under Rule 2:03.

An affidavit of the person giving the notice shall be evidence thereof.

This rule shall not apply to original process or notice to bring a party before the court.

The words "registered mail" in these rules shall include "certified mail."

2:05 Time for Pleadings and Proceedings When Last Day for Performance Falls on Saturday, Sunday or Legal Holiday.

(Applicable to criminal cases.)

When the day or the last day for the performance of any act authorized or required by these rules or by any order of the court falls on Saturday, Sunday, or a legal holiday, the act may be performed on the next succeeding business day, unless a contrary intent appears.

2:06 Eliminating Requirements of Verification by Oath or Affirmation.

(Applicable to criminal cases.)

No written statement in any proceeding in this court required to be verified by affidavit shall be required to be verified by oath or affirmation if it contains or is verified by a written declaration that it is made under the penalties of perjury.

2:07 Hearings Before Single Justice, Notice.

(Applicable to civil cases.)

When any party desires a hearing before a single justice, except at a sitting of the court held in Suffolk County, he may apply to a justice to appoint a time and place for the hearing; and when such time and place have been appointed, notice shall be given in accordance with the Massachusetts Rules of Civil Procedure (see, e.g., Rule 5 of Mass.R.Civ.P.) or the Massachusetts Rules of Appellate Procedure, where applicable (see, e.g., Rules 1 [b], 13, and 15[c] of Mass.R.A.P., and S.J.C. Rule 2:20). But this rule shall not prevent a party from obtaining a temporary restraining order, or a dissolution of the same or of an injunction, or other order, upon a shorter notice, or without notice, if the court shall think the same reasonable. And cases may be heard by consent of parties, and the permission of the court, without such notice.

2:08 Jury Issues.

(Applicable to criminal cases.)

Whenever it is necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury together with such part of the answers, depositions, and other proceedings in the cause as the court shall direct.

2:09 Copies to Adverse Parties.

(Applicable to criminal cases.)

When any pleading or motion is filed after the bill, complaint, or petition, or when any bill of particulars or specifications or answers to interrogatories are filed, a copy thereof shall be given not later than the day of filing to each of the adverse parties in the manner provided for notices by Rule 2:04.

In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

2:10 Money Paid into Court.

(Applicable to civil cases.)

Money paid into court shall be in the custody of the clerk, whose duty it shall be to receive it when paid under the authority of law or rule or order of the court. He shall pay it as directed by

the court; but money paid into court upon tender, or otherwise for the present and unconditional use of a party, shall be paid, on request, without special order, with any interest which has accrued thereon, to such party, at whose risk it shall be from the time when it is paid into court. Money payable to a party may be paid to his attorney of record.

No interest shall be deemed to accrue on any sum less in amount than the minimum on which interest is payable in the depositary in which the money is deposited.

2:11 Hearings Upon Motions Grounded on Facts.

(Applicable to criminal cases.)

The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested.

2:12 Postponement for Want of Evidence.

(Applicable to criminal cases.)

The court need not entertain any motion for postponement, grounded on the want of material testimony, unless supported by an affidavit, which shall state (1) the name, and, if known, the residence, of the witness whose testimony is wanted, (2) the particular testimony which he is expected to give, with the grounds of such expectation, and (3) the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. The party objecting to the postponement shall not be allowed to contradict the statement of what the absent witness is expected to testify, but may disprove any other fact stated in such affidavit. Such motion will not ordinarily be granted if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as evidence at the trial or hearing, as though the witness were present and so testified; and such agreement shall be in writing, upon the affidavit, and signed by such adverse party or his attorney. The same rule shall apply, mutatis mutandis, when the motion is grounded on the want of any material document, thing, or other evidence. In all cases the granting or denial of a motion for postponement shall be discretionary, whether the foregoing provisions have been complied with or not.

2:13 Special Masters and Commissioners.

(Applicable to all cases.)

The full court may designate special masters and commissioners to deal with specified cases or with such matters as may be referred to them by a written order of a single justice or of the full court. The acts of any such special master and commissioner, when confirmed or approved, by a single justice or by the full court, as the case may be, shall have all the force and effect of a decision by a single justice or by the full court.

2:14 Writ of Protection.

(Applicable to all cases.)

A writ of protection shall issue only upon the application of the person for whom the writ of protection is to be issued, or some person in his behalf, and upon order of the court, and then only in case it is made to appear to the court, by affidavit and any other evidence that the court may require, (1) that the application is made in good faith and for the purpose of enabling such person to attend this court as a party or witness in some specified case pending, (2) if such person is a party, that such case has not been brought collusively to enable him to obtain a writ of protection, and (3) if such person is a witness, that he has not been required to attend as a witness by his own request or procurement to enable him to obtain a writ of protection.

2:15 Objections.

(See Mass. R. Civ. P. 46.)

(1) Civil Cases. Objections to evidence in civil cases shall be decided without argument, unless the presiding judge calls upon the parties to state the grounds upon which the evidence is offered or objected to.

(2) Criminal Cases. Exceptions to rulings or orders of the court in criminal cases are unnecessary and for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

If a party objects to a ruling or order of the court, he may state the precise legal grounds of his objection, but he shall not argue or further discuss such grounds unless the court calls upon him for such argument or discussion.

Objections to any opinion, ruling, direction or judgment made in the absence of counsel shall be taken by a writing filed with the clerk within three days after receipt from the clerk of notice thereof.

2:16 Requests for Rulings.

(Applicable to all cases.)

Requests for rulings, when appropriate, shall be made in writing before the closing arguments unless special leave is given to present further requests later.

2:17 Time for Arguments.

(Applicable to criminal cases.)

All arguments shall be limited to one-half hour on each side, unless for good cause shown, the court shall allow further time; and, when more than one counsel are to be heard on the same side, the time may be divided between them as they may elect.

2:18 Order of Business, Single Justice Sittings.

The justice designated to hear matters within the jurisdiction of a single justice at Boston will hear such matters once each week, except in the weeks in which his or her attendance with the full court is required during consultation or argument, and except as the number of cases to be heard does not require sitting. The sitting shall be on Wednesday, unless the single justice otherwise directs. A weekly list for hearing in Boston will be made up on which cases from any county may be set down, either by order of the court or by joint request of counsel, the hearing of which cases shall be subject to the discretion of the court. Matters to be heard before a single justice will be heard in Boston unless the full court or the single justice shall otherwise order. The single justice in his or her discretion may set any matter down for hearing in any place within the Commonwealth.

2:19 Reviews of Orders of Department of Public Utilities.

(Applicable to proceedings to review orders, etc., of the department of public utilities.)

So far as the Massachusetts Rules of Civil Procedure are applicable, they shall govern proceedings brought under the provisions of G.L. c. 25, § 5, or acts in amendment thereof.

Unless the interests of justice plainly require, no stay of an order of the department of public utilities shall be ordered except after notice to the Attorney General or the commissioners of the department.

An order of the department fixing the rates, fares, charges, or prices for service furnished by a person or corporation under its jurisdiction shall not be stayed unless provision be made by the party applying for such stay by bond or other security for the repayment, in the event the order is finally sustained, of so much of rates, fares, charges, or prices collected, while such stay is in effect, as is in excess of those fixed in the order.

2:20 Appeals from Decisions of Appellate Tax Board.

Interlocutory matters arising in appeals from the decisions of the Appellate Tax Board and questions of final disposition thereof when further proceedings appear unnecessary may be presented to a single justice, who may after notice hear and determine the same both as to questions of law and of fact or reserve and report the case.

2:21 Appeal from Single Justice Denial of Relief on Interlocutory Ruling.

(Applicable to civil and criminal cases.)

(1) When a single justice denies relief from a challenged interlocutory ruling in the trial court and does not report the denial of relief to the full court, the party denied relief may appeal the single justice's ruling to the full court. Unless the court otherwise orders, the notice of appeal shall be filed with the Clerk of the Supreme Judicial Court for Suffolk County within seven days of the entry of the judgment appealed from. Unless the single justice or the full court orders otherwise, neither the trial nor the interlocutory ruling in the trial court shall be stayed.

(2) The appeal shall be presented to the full court on the papers filed in the single justice session, including any memorandum of decision. Nine copies of the record appendix must be filed in the Office of the Clerk of the Supreme Judicial Court for the Commonwealth within fourteen days after the date on which the appeal is docketed in the full Supreme Judicial Court. The record appendix shall be accompanied by eight copies of a memorandum of not more than ten pages, double-spaced, in which the appellant must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means. No response from the prevailing party shall be filed, unless requested by the court.

(3) This rule shall not apply to interlocutory appeals governed by Rule 15 of the Massachusetts Rules of Criminal Procedure.

(4) The full court will consider the appeal on the papers submitted pursuant to this rule, unless it otherwise orders.

2:22 Petitions Under G. L. c. 211, § 3.

(Applicable to civil and criminal cases.)

Any petition seeking to invoke the general superintendency power of the court pursuant to G. L. c. 211, § 3, shall name as respondents and make service upon all parties to the proceeding before the lower court, including in criminal cases the Commonwealth through the District Attorney or Attorney General as appropriate. When the lower court is named as a respondent, service upon the lower court shall be made in accordance with Rule 4(d)(3) of the Rules of Civil Procedure by delivering a copy to the clerk of the lower court and to the Boston office of the Attorney General. Unless otherwise ordered by the single justice, the lower court shall thereafter be treated as a nominal party which may, but need not, appear and be heard.

CHAPTER THREE : ETHICAL REQUIREMENTS AND RULES CONCERNING THE PRACTICE OF LAW

3:01 Attorneys.

Section 1. Filing Requirements for Admission.

1.1 Admission by Written Examination. Persons desiring admission to the bar of the Commonwealth by written examination shall apply by filing with the Clerk of the Supreme Judicial Court for the county of Suffolk:

1.1.1 Petition for Admission accompanied by the recommendation of a member of the bar of this Commonwealth or of any state, district or territory of the United States;

1.1.2 Applicant's Statement;

1.1.3 Authorization Form;

1.1.4 Law School Certificate;

1.1.5 Multistate Professional Responsibility Examination Score Report that sets forth a passing scaled score;

1.1.6 Two (2) Letters of Recommendation for Admission; and

1.1.7 Current Certificate(s) of Admission and Good Standing from the highest judicial court of each state, district, territory or foreign country to which the applicant is admitted, if applicable.

1.2 Admission by Motion. Persons desiring admission to the bar of the Commonwealth by motion, pursuant to Rule 3:01, Section 6.1 or 6.2, shall apply by filing with the Clerk of the Supreme Judicial Court for the county of Suffolk:

1.2.1 Petition for Admission accompanied by the recommendation of a member of the bar of this Commonwealth or of any state, district or territory of the United States;

1.2.2 Applicant's Statement;

1.2.3 Multistate Professional Responsibility Examination Score Report;

1.2.4 National Conference of Bar Examiners Request for Preparation of a Character Report;

1.2.5 For admission on motion pursuant to Section 6.1, three (3) letters of Recommendation for Admission from members of the bar of the Commonwealth or of the bar of the state, district or territory of the United States where the applicant is admitted or last practiced. At least one letter must be from a member of the bar of the state, district or territory of the United States where the applicant is admitted;

1.2.6 For admission on motion pursuant to Section 6.2, three (3) letters of Recommendation for Admission from members of the bar of the Commonwealth or of the bar of the province or territory of Canada where the applicant is admitted or last practiced. At least one letter must be from a member of the bar of the province or territory of Canada where the applicant is admitted;

1.2.7 Current Certificate(s) of Admission and Good Standing from the highest judicial court of each state, district, territory, province or foreign country to which the applicant is admitted;

1.2.8 Letter from the grievance or disciplinary entity of each state, district, territory, province or foreign country to which the applicant is admitted indicating that there are no charges pending against the applicant;

1.2.9 For admission on motion pursuant to Section 6.1, proof of active practice or teaching of law in a state, district or territory of the United States for five out of the past seven years immediately preceding the filing of petition for admission on motion;

1.2.10 For admission on motion pursuant to Section 6.2, proof of active practice or teaching of law in a province or territory of Canada for five out of the past seven years immediately preceding the filing of petition for admission on motion.

1.3 Referral to Board of Bar Examiners. All petitions for admission with accompanying materials shall be referred to the Board of Bar Examiners for a report as to the character, acquirements and qualifications of the applicant. See Rules V and VI of the Rules of the Board of Bar Examiners.

Section 2. Bar Examinations.

2.1 Time and Place. Law examinations shall be held at least twice a year in Massachusetts. The Board shall fix the times and places of the examinations and shall give due notice thereof.

Section 3. Qualifications for Taking Bar Examination.

3.1 Graduates of law schools in a state, district or territory of the United States.

3.1.1 High School. Each applicant for admission by examination shall have been graduated from a public high school or its equivalent, or shall have received the equivalent education in the opinion of the Board.

3.1.2 College. Each applicant shall have completed the work acceptable for a bachelor's degree in a college or university, or have received an equivalent education in the opinion of the Board.

3.1.3 Law School. Each applicant shall have graduated with a degree of bachelor of laws or juris doctor from a law school which, at the time of graduation, is approved by the American Bar Association or is authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor.

3.2 Graduates of Foreign Law Schools. Graduates of law schools in foreign countries must have a college and legal education that is, in the opinion of the Board, similar in nature and quality to that of graduates of law schools approved by the American Bar Association. Before permitting such an applicant to take the law examination, the Board in its discretion may, as a condition to such permission, require such applicant to take such further legal studies as the Board may designate at a law school approved by the American Bar Association.

Section 4. Public Notice of Bar Examination Results.

4.1 Notice and Publication. Before the Board of Bar Examiners reports to the Court on the character, acquirements, and qualifications of an applicant for admission, the Board shall prepare a list of names of those applicants who passed the written law examination (under Rule 3:01, Section 3) and who, if no objection is made, may be recommended to the Supreme Judicial Court for admission.

A copy of the list of names shall be sent to the Clerk of the Supreme Judicial Court for Suffolk County and the clerk of courts for each county who shall post the list in a public place for a period of seven days from a date fixed by the Board of Bar Examiners.

A copy of the list of names shall be sent to the Board of Bar Overseers, to the Massachusetts Bar Association, to the Boston Bar Association and such other bar associations and newspapers in the Commonwealth as the Board of Bar Examiners shall determine.

4.2 Report to the Court. Not sooner than ten days after the date fixed for posting by the Board of Bar Examiners, the Board may report to the Supreme Judicial Court the names of those applicants then found qualified for admission under Section 3.

Section 5. Disposition of Petitions for Admission.

5.1 Qualified Applicants. The petitions for admission of those who pass the law examination and who are found by the Board of Bar Examiners to be of good moral character and of sufficient acquirements and qualifications may be allowed and the applicants may be admitted either (a) in open court upon subscription to the attorneys' oaths, at such times and places as the Supreme Judicial Court shall appoint, or (b) by mail in accordance with procedures established by the Supreme Judicial Court and administered by the Clerk of the Supreme Judicial Court for Suffolk County.

5.2 Admission of Qualified Applicants within a Limited Time. Except as otherwise ordered by a Justice of the Supreme Judicial Court, a qualified applicant for admission may be sworn and enrolled as an attorney within one year of the report to the Court (Rule 3:01, subsection 4.2) concerning the applicant, and, if not so sworn and enrolled, the applicant may thereafter be sworn and enrolled only if he or she satisfies the Board of Bar Examiners as to his or her current legal knowledge, qualifications, and good moral character.

5.3 Non-Qualified Applicants. The petitions of those found not qualified shall be dismissed at the expiration of sixty days from the Board of Bar Examiners' report of non-qualification, unless within that period the Chief Justice of the Supreme Judicial Court, on application of the petitioner, shall order a hearing on the matter.

Section 6. Admission on Motion.

6.1 Persons admitted to practice in the United States. A person who has been admitted as an attorney of the highest judicial court of any state, district or territory of the United States may apply to the Supreme Judicial Court for admission on motion as an attorney in this Commonwealth. Prior failure to pass the Massachusetts bar examination creates a rebuttable presumption against admission on motion. The Board of Bar Examiners may, in its discretion, excuse the applicant from taking the regular law examination on the applicant's compliance with the following conditions:

6.1.1 The applicant shall have been admitted in another state, district or territory of the United States for at least five years prior to applying for admission in the Commonwealth, and shall

have engaged in the active practice or teaching of law in a state, district or territory of the United States for five out of the past seven years immediately preceding the filing of the petition for admission on motion.

6.1.2 The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.

6.1.3 Omitted

6.1.4 Graduates of law schools in a state, district or territory of the United States. The applicant shall have graduated from high school, or shall have received the equivalent education, in the opinion of the Board, completed work for a bachelor's degree at a college or university, or its equivalent, and graduated from a law school which at the time of graduation was approved by the American Bar Association or was authorized by a state statute to grant the degree of bachelor of laws or juris doctor.

Graduates of Foreign Law Schools. Graduates of law schools in foreign countries must have a college and legal education that is, in the opinion of the Board, similar in nature and quality to that of graduates of law schools approved by the American Bar Association.

6.1.5 The applicant shall pass the Multistate Professional Responsibility Examination if he or she has not previously passed that examination in another jurisdiction.

6.2 Graduates of Canadian law schools who are admitted to practice in Canada. A person who has graduated from a law school in Canada, and who has been admitted as an attorney in the Law Society of any Canadian province or territory, may apply to the Supreme Judicial Court to be admitted on motion as an attorney in this Commonwealth. Prior failure to pass the Massachusetts bar examination creates a rebuttable presumption against admission on motion. The Board of Bar Examiners may, in its discretion, excuse the applicant from taking the regular law examination on the applicant's compliance with the following conditions:

6.2.1 The applicant shall have completed a college and legal education that is, in the opinion of the Board, similar in nature and quality to that of graduates of law schools approved by the American Bar Association.

6.2.2 The applicant shall have been admitted in a Canadian province or territory for at least five years prior to applying for admission in the Commonwealth, and shall have engaged in the active practice or teaching of law in such province or territory for five out of the seven years immediately preceding the filing of the petition for admission on motion.

6.2.3 The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.

6.2.4 The applicant shall pass the Multistate Professional Responsibility Examination.

6.3 Notice and Publication for Admission under Section 6. Before the Board of Bar Examiners reports to the Court on the character, acquirements, and qualifications of applicants for admission, the Board shall prepare a list of names of applicants who, if no objection is made, may be recommended to the Supreme Judicial Court for admission.

A copy of the list of names shall be sent to the Clerk of the Supreme Judicial Court for Suffolk County and the clerk of courts for each county who shall post the list in a public place for a period of seven days from a date fixed by the Board of Bar Examiners.

A copy of the list of names shall be sent to the Board of Bar Overseers, to the Massachusetts Bar Association, to the Boston Bar Association and such other bar associations and newspapers in the Commonwealth as the Board of Bar Examiners may determine.

6.4 Report to the Court. Not sooner than ten days after the date fixed for posting by the Board of Bar Examiners, the Board may report to the Supreme Judicial Court the names of those applicants then found qualified for admission under § 6.

6.5 Time Limitation for Enrollment. Except as otherwise ordered by a Justice of the Supreme Judicial Court, a qualified applicant may be sworn and enrolled as an attorney within one year of the report to the Court. Failure to be so sworn and enrolled will result in dismissal of the application.

Section 7. Bar Examiner's Rules.

7.1 The Board of Bar Examiners may, subject to the approval of the Supreme Judicial Court, make rules consistent with these rules.

Section 8. Subpoenas.

8.1 Any member of the Board of Bar Examiners may summon witnesses to appear before the Board.

Section 9. Immunity.

9.1. The Board of Bar Examiners, and its members, employees, and agents are immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law.

9.2. Records, statements of opinion and other information regarding an applicant for admission to the bar communicated by any entity, including any person, firm, or institution, without malice, to the Board of Bar Examiners, or to its members, employees or agents are privileged, and civil suits predicated thereon may not be instituted.

3:02 Administration of Justice.

(1) A corporation or association shall not be represented under G.L. c. 221, § 46, by a disbarred attorney.

(2) All clerks of court, registers of probate, the recorder of the Land Court and their assistants and employees in their offices are prohibited from engaging in the practice of law during the time they hold such office or employment.

3:03 Legal Assistance to the Commonwealth and to Indigent Criminal Defendants, and to Indigent Parties in Civil Proceedings.

(1) A senior law student in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, who has successfully completed or is enrolled in a course for credit in evidence or trial practice, with the written approval by the dean of such school of his character, legal ability, and training, may appear without compensation (a) on behalf of the Commonwealth (including a subdivision of the Commonwealth or an agency of the Commonwealth or of a subdivision) in proceedings in any division of the District Court, Juvenile Court, Probate and Family Court or Housing Court Departments or in the Boston Municipal Court Department, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth who is a regular or special assistant district attorney, a regular or special assistant attorney general, an agency counsel or assistant agency counsel, or a corporation counsel, city solicitor, town counsel, assistant municipal counsel or assistant solicitor; (b) on behalf of indigent defendants in criminal proceedings in any division of the District Court, Juvenile Court or Housing Court Departments or in the Boston Municipal Court Department, or in the Supreme Judicial Court or the Appeals Court, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth assigned to the case by the Committee for Public Counsel Services or employed by a non-profit program of legal aid, legal assistance or defense or a law school clinical instruction program; and (c) on behalf of indigent parties in civil proceedings in any division of the District Court, Juvenile Court, Probate and Family Court, or Housing Court Departments or in the Boston Municipal Court Department, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth assigned by the Committee for Public Counsel Services or employed by a non-profit program of legal aid, legal assistance or defense or a law school clinical instruction program.

(2) The expression "general supervision" shall not be construed to require the attendance in court of the supervising member of the bar. The term "senior student" or "senior law student" shall mean students who have completed successfully their next to the last year of law school study.

(3) The written approval described in paragraph (1), for a student or group of students, shall be filed with the clerk of the Supreme Judicial Court for the county of Suffolk and shall be in effect, unless withdrawn earlier, until the date of the first bar examination following the student's graduation, and as to a student taking that examination, until the announcement of the results thereof. For any student who passes that examination, the approval shall continue in effect for six

months after the date of examination or until the date of his or her admission to the bar, whichever is sooner, unless otherwise ordered by the Supreme Judicial Court.

(4) A justice of the Superior Court Department may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear without compensation on behalf of the Commonwealth or on behalf of an indigent defendant in a criminal proceeding:

(a) on a motion for a new trial in that court seeking post-conviction relief after the time for direct appeal has expired, or (if such an appeal has been taken) after the appeal has been decided by the Supreme Judicial Court, or

(b) on an appeal for review of sentence in the Appellate Division of that court under G.L. c. 278, §§ 28A-28D, or

(c) on a petition heard in that court, under G.L. c. 276, § 58, as amended, for review of District Court refusal to authorize pre-trial release of defendant on personal recognizance.

(5) A justice of the Superior Court or the Land Court Department may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear without compensation on behalf of the Commonwealth or indigent parties in civil proceedings.

(6) If an appearance by a senior law student is not permitted as of right by this rule, a justice of the Supreme Judicial Court or of the Appeals Court may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear in those courts without compensation on behalf of the Commonwealth or indigent persons. Successful completion of or enrollment in a course for credit in appellate practice in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, may, in the discretion of an appellate justice, be deemed a substitute for the course requirement provision of paragraph (1) of this rule.

(7) A senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, may appear without compensation on behalf of the Commonwealth or indigent parties before any administrative agency, provided such appearance is not inconsistent with its rules.

(8) A student who has begun his next to the last year of law study in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, qualified and supervised as provided in paragraphs (1) through (3) above, may appear in civil proceedings under the same conditions as a senior law student, provided that the written approval referred to in paragraphs (1) and (3) states that he is currently participating in a law school clinical instruction program.

(9) Rule 3:03 applies only to a student whose right to appear commenced at least three months prior to graduation from law school. Subject to the time limitations expressed in paragraph (3) of this rule, such a student may make appearances after graduation under the same or any other

non-profit program of legal aid, legal assistance, prosecution or defense, or law school clinical instruction.

3:04 Limited Practice by Attorneys from Other Jurisdictions who are Engaged in Certain Graduate Law Studies or Programs Of Legal Assistance.

(1) A person (a) who is enrolled in a graduate criminal law or poverty law and litigation program in an approved Massachusetts law school or who, after graduation from an approved law school, is employed by or associated with an organized nonprofit legal services program providing legal assistance to indigents in civil or criminal matters, and (b) who is a member of the bar of the highest judicial court of any state, district, or territory of the United States (or in the case of the District of Columbia, of the District Court of the United States for the District of Columbia), may engage in practice before the courts of the Commonwealth in all causes in which he is associated with such graduate program or with an organized nonprofit defender association or an organized nonprofit legal services program. Practice under this rule shall be limited to the above causes. The permission granted by this rule shall become effective upon filing with the clerk of this court for Suffolk County a certificate of any such court of another jurisdiction certifying that the attorney is a member in good standing at the bar of that court, and also (a) a statement signed by a representative of the law school that the attorney is enrolled in the specified graduate program or (b) a statement signed by a representative of the organized legal services program that the attorney is currently associated with such program. An attorney engaging in practice under this rule shall be subject to the provisions of Chapter Four of these rules, and the permission granted by this rule shall be conditioned on compliance by the attorney with the requirements of Rules 4:02 and 4:03.

(2) Practice under this rule shall cease whenever that attorney ceases to be enrolled in or associated with such a program. When an attorney ceases to be so enrolled or associated, a statement to that effect shall be filed with the clerk of this court for Suffolk County by a representative of the law school or legal services program. In no event shall an attorney engage in practice under this rule for more than two years.

3:05 Licensing of Foreign Legal Consultants.

Section 1. General Regulation as to Licensing.

1.1 Petitions. A person desiring to be licensed to practice in this Commonwealth as a foreign legal consultant shall apply by filing an application for such license with the Clerk of the Supreme Judicial Court for the County of Suffolk on such form as the Clerk may prescribe for this purpose. Upon the recommendation of the Board of Bar Examiners, the Supreme Judicial Court may, in its discretion, grant such application.

1.2 General Qualifications. A person will be considered eligible for licensing as a foreign legal consultant only if such person:

(a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent

and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) for at least five years immediately preceding his or her application has been a member in good standing of such legal profession and has been engaged in the practice of law in such foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(c) possesses the good moral character and general fitness requisite for a member of the bar of this Commonwealth; and

(d) intends to practice as a foreign legal consultant in this Commonwealth and to maintain an office in this Commonwealth for that purpose.

Section 2. Proof Required.

Every applicant for a license as a foreign legal consultant shall file with the application to the Clerk:

(a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over profession discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;

(b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English;

(d) affidavits as to the applicant's good moral character and fitness from three reputable persons residing in this Commonwealth and not related to the applicant, one of whom shall be a member of the bar of the Commonwealth; and

(e) such other evidence as to the nature and extent of the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the Board of Bar Examiners may require.

Section 3. Reciprocal Treatment of Members of the Board of the Commonwealth.

In considering whether to recommend an applicant to practice as a foreign legal consultant, the Board of Bar Examiners may in its discretion take into account whether a member of the bar of this Commonwealth would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the

bar who is seeking or has sought to establish an office in that country may request the Board of Bar Examiners to consider the matter, or the Board may do so sua sponte.

Section 4. Disposition of Applications.

4.1 Qualified Applicants. The applications of those who are found by the Board of Bar Examiners to have satisfied the requirements for licensing as foreign legal consultants may be allowed by the Supreme Judicial Court and the applicants may be licensed upon (i) the taking of such oaths as the Supreme Judicial Court shall prescribe, (ii) paying the prescribed registration fee, and (iii) fulfilling all other requirements set forth in this Rule or otherwise promulgated by the Supreme Judicial Court.

4.2 Non-Qualified Applicants. The applications of those who are not recommended by the Board of Bar Examiners for licensing as foreign legal consultants shall be denied, subject to the right of the applicant to request a hearing on the matter before the Supreme Judicial Court.

Section 5. Scope of Practice.

5.1 Limitations. A person licensed to practice as a foreign legal consultant under this Rule may render legal services in this Commonwealth subject, however, to the limitations that he or she shall not:

(a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this Commonwealth (other than upon admission pro hac vice pursuant to G.L.c. 221, § 39);

(b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;

(c) prepare:

(i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or

(ii) any instrument relating to the administration of a decedent's estate in the United States of America;

(d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(e) render professional legal advice on the law of this Commonwealth or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise);

(f) be, or in any way hold himself or herself out as, a member of the bar of this Commonwealth unless duly admitted as such; or

(g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:

(i) his or her own name;

(ii) the name of the law firm with which he or she is affiliated;

(iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

(iv) the title "foreign legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

5.2 Not Unauthorized Practice of Law. A duly licensed foreign legal consultant acting in accordance with the foregoing limitations shall not be considered engaged in the unauthorized practice of law for purposes of G.L. c. 221, § 46A (or any successor provision).

Section 6. Rights and Obligations.

6.1 Rules of Professional Conduct. Subject to the limitations set forth in Section 5 of this Rule, a person licensed to practice as a foreign legal consultant under this Rule shall be entitled and subject to the rights and obligations set forth in Rule 3:07 (Massachusetts Rules of Professional Conduct) or arising from the other conditions and requirements that apply to a member of the bar of this Commonwealth under the rules of the Supreme Judicial Court.

6.2 Affiliation. A person licensed to practice as a foreign legal consultant under this Rule may affiliate with one or more members of the bar of this Commonwealth, including by:

(a) employing one or more members of the bar of this Commonwealth;

(b) being employed by one or more members of the bar of this Commonwealth or by any partnership or professional corporation which includes members of the bar of this Commonwealth or which maintains an office in this Commonwealth; or

(c) being a partner in any partnership or shareholder in any professional corporation which includes members of the bar of this Commonwealth or which maintains an office in this Commonwealth.

6.3 Privilege. A person licensed to practice as a foreign legal consultant under this Rule shall enjoy the same attorney-client privilege, work-product privilege and similar professional privileges as members of the bar of this Commonwealth.

Section 7. Service of Process.

7.1 Appointment of Clerk as Agent for Service of Process. Every person licensed to practice as a foreign legal consultant under these Rules shall execute and file with the Supreme Judicial Court, in such form and manner as such court may prescribe, an instrument, in writing, setting forth his or her address in this Commonwealth and designating the Clerk of the Supreme Judicial Court for Suffolk County as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within the Commonwealth or to residents of this Commonwealth, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this Commonwealth as he or she shall have filed in the office of such Clerk by means of a supplemental instrument in writing.

7.2 Effect of Service on Clerk. Service of process on such Clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such Clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of $10. Service of process shall be complete when such Clerk has been so served. Such Clerk shall promptly send one of such copies to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such foreign legal consultant at the address specified by him or her as aforesaid.

Section 8. Revocation of License.

In the event that the Supreme Judicial Court determines that a person licensed as a foreign legal consultant under this Rule no longer meets the requirements for licensure set forth in Section 1 of this Rule, it shall revoke the license granted to such person hereunder.

Section 9. Admission to the Bar.

In the event that a person licensed as a foreign legal consultant under this Rule is subsequently admitted as a member of the bar of this Commonwealth under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this Commonwealth.

Section 10. Application for Waiver of Provisions.

The Supreme Judicial Court, upon application, may in its discretion vary the application of or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

3:06 Use of Limited Liability Entities.

(1) As used in this rule, the term "entity" shall mean a professional corporation, a limited liability company, or a limited liability partnership organized to practice law pursuant to the laws of any

state or other jurisdiction of the United States and which practices law in the Commonwealth. The provisions of such laws shall be applicable to attorneys practicing law in the Commonwealth subject to the terms and conditions of this rule. Such terms and conditions are necessary and appropriate for the purpose of making the provisions of those laws applicable to attorneys. As used in this rule, the term "owner" shall mean a shareholder of a professional corporation, a member of a limited liability company, or a partner of a limited liability partnership.

(2) In addition to other provisions required by law, the articles of organization or similar organizational document (''Charter") of each entity shall contain provisions to assure compliance with the following requirements:

(a) All owners shall be persons who are duly licensed by this court to practice law in the Commonwealth, if they are actively engaged in the practice of law in the Commonwealth, or duly licensed by the licensing authority of the jurisdiction in which they are actively engaged in the practice of law. All owners shall be in good standing before this court or before the licensing authority of the jurisdiction in which they are actively engaged in the practice of law, and all owners of the entity shall own their shares or other ownership interests in their own right. All owners shall be individuals who, except for temporary absence due to illness or accident, time spent in the Armed Services of the United States, vacations, and leaves of absence not to exceed two years, are actively engaged in the practice of law as employees or owners of the entity. Notwithstanding the foregoing, an owner may be an entity rather than an individual, provided that the owners of such entity are individuals who satisfy all of the other conditions of this rule.

(b) Any owner who ceases to be eligible to be an owner and the executor, administrator, or other legal representative of a deceased owner shall be required to dispose of his or her shares or other ownership interests as soon as reasonably possible either to the entity or to an individual or entity duly qualified to be an owner of the entity.

(c) The name of the entity shall contain words or abbreviations that indicate that it is a limited liability entity and shall also conform to the requirements of Mass.R.Prof.C. 7.5.

(d) All owners of the entity shall, by becoming owners, agree to the provisions of this rule, including without limitation paragraph (3) of this rule.

(e) All directors of a professional corporation and managers of a limited liability company, as the case may be, shall be owners.

(3) The following provisions are established with respect to the liability of the owners of an entity with respect to damages which arise out of the performance of legal services by the entity, such provisions to be in addition to any statutory or common law rules of general application which deal with the liability of entities and their owners:

(a) Each owner of the entity shall be personally liable for damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission. Owners of the entity whose acts, errors, or omissions did not cause the damages shall not be personally liable therefor, whether or not they

have agreed with any owners or employees or other persons to contribute to the payment of the liability, except to the extent provided in subparagraphs (b), (c), and (d).

(b) All the owners of an entity which is a professional corporation at the time of any negligent or wrongful act, error, or omission of any owner or employee of said entity which occurs in the performance of legal services by said entity and which results in damages to the person or persons for whom the services were being performed shall be jointly and severally liable for such damages, but only to the extent of the excess, if any, of (1) the sum of $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity at the time of such act, error, or omission who are duly licensed by this court to practice law in the Commonwealth, or duly licensed to practice law by the licensing authority in the jurisdiction in which they practice, and who are owners of or employed by said entity as lawyers, but not in excess of $500,000 in the aggregate, over (2) the sum of the assets of said entity and the proceeds of any insurance policy issued to it which are applied to the payment of such damages.

(c) Each entity which is not a professional corporation shall maintain at all times either (a) professional liability insurance covering negligence, wrongful acts, errors, and omissions of said entity and its owners and employees in connection with their performance of legal services in an amount per claim and in an annual aggregate limit, exclusive of any deductible or retention, not less than the Designated Amount, or (b) a specifically designated and segregated fund for the satisfaction of judgments against said entity or its owners or employees based on their professional negligence, wrongful acts, errors, or omissions in connection with their performance of legal services in not less than the Designated Amount, maintained as (i) a deposit in trust or a bank escrow of cash, bank certificates of deposit, or United States Treasury obligations, or (ii) a bank letter of credit or an insurance company bond. As used herein the term "Designated Amount" shall mean $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity who are licensed to practice law in the Commonwealth or another jurisdiction, but not in excess of $500,000 in the aggregate. If such an entity fails to maintain insurance or a fund in the Designated Amount in compliance with this rule, its owners at the time when a professional liability claim is asserted shall be jointly and severally liable to the claimant for an amount not to exceed the Designated Amount applicable at that time, less the sum of the assets of said entity and the proceeds of any professional liability insurance policy issued to it which are applied to the payment of said liability.

(d) If an entity is an owner (an "ownership entity") or a partner in a general partnership, the provisions of subparagraphs (a), (b), and (c) shall apply to each of the individual owners of such ownership entity or such partners, and the formulas in subparagraphs (b) and (c) shall be based on all of the individual owners, partners, and employees of the entity or general partnership and of each ownership entity and partner thereof who is licensed to practice law.

(4) The entity shall at all times comply with all applicable standards of professional conduct which may be established by this court or by the licensing authority of any jurisdiction in which the entity practices law. Any violation of such standards shall be grounds for this court, after hearing and if it deems the circumstances appropriate, to terminate or suspend the right of the entity to practice law in the Commonwealth.

(5) Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the entity or an ownership entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with any specific standards which may be promulgated by this court or the licensing authority of the jurisdiction in which the attorney practices. Any attorney who by act or omission causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(6) Nothing in this rule shall be deemed to modify, abrogate, or reduce the attorney-client privilege or any comparable privilege or relationship whether statutory or deriving from the common law.

(7) Nothing in this rule shall prohibit the use of a voting trust to hold stock of a professional corporation. For all purposes under this rule, a person who holds a beneficial interest in such a voting trust shall be treated as a shareholder of the corporation, and, additionally, shall be deemed to own in his or her own right a percentage of shares in the corporation equal to his or her percentage of beneficial interest in the shares held by the voting trust.

(8) An entity which is a limited liability partnership or a limited liability company shall not be deemed to be an "association" pursuant to G.L. c. 221, § 46.

3:07 Massachusetts Rules of Professional Conduct.

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

1. A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

3. In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should

demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

5. As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

6. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

7. A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

8. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

9. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

10. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

11. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

12. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily on understanding and voluntary compliance, secondarily on reinforcement by peer and public opinion, and, finally, when necessary, on enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that

ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth.

[5] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act on uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, including the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[6] "A violation of a canon of ethics or a disciplinary rule … is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence." Id. at 649.

[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[8] [RESERVED]

[9] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1 Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. See Rule 7.4.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation

are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. While the Supreme Judicial Court has not established a formal system of peer review, some of the bar associations have informal systems, and the lawyer should consider making use of them in appropriate circumstances. Corresponding ABA Model Rule. Identical to Model Rule 1.1. Corresponding Former Massachusetts Rule. DR 6-101.

Rule 1.2 Scope of Representation.

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

[1] A lawyer should seek to achieve the lawful objectives of a client through permissible means. This does not prevent a lawyer from observing such rules of professional courtesy as those listed in Rule 1.2(a). The specification of decisions subject to client control is illustrative, not exclusive. In general, the client's wishes govern the conduct of a matter, subject to the lawyer's professional obligations under these Rules and other law, the general norms of professional courtesy, specific understandings between the lawyer and the client, and the rules governing withdrawal by a lawyer in the event of conflict with the client. The lawyer and client should therefore consult with one another about the

general objectives of the representation and the means of achieving them. As the Rule implies, there are circumstances, in litigation or otherwise, when lawyers are required to act on their own with regard to legal tactics or technical matters and they may and should do so, albeit within the framework of the objectives of the representation.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

[4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. or required by Rule 3.3, 4.1, or 8.3. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See the discussion of the meaning of "assisting" in Comment 3 to Rule 4.1 and the special meaning in Comment 2A to Rule 3.3. Withdrawal from the representation, therefore, may be required. But see Rule 3.3(e).

[8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[9] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Corresponding ABA Model Rule. Identical to Model Rule 1.2, except the first two sentences of (a) replace the first sentence of the Model Rule.

Corresponding Former Massachusetts Rule. (a) and (b) no counterpart, except that the first sentence of (a) comes from DR 7-101 (A); (c) DR 7-101 (B) (1); (d) DR 7-102 (A) (6) and (7), DR 7-106, S.J.C. Rule 3:08, DF 7; (e) DR 2-110 (C) (1) (c), DR 9-101 (C).

Rule 1.3 Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued subject to Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[1A] It is implicit in the second sentence of the rule that a lawyer may not intentionally prejudice or damage his client during the course of the professional relationship.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed

concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Corresponding ABA Model Rule. Identical to Model Rule 1.3 with the addition of the clause at the end of the Rule.

Corresponding Former Massachusetts Rule. DR 6-101 (A) (3); DR 7-101.

Rule 1.4 Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is set forth in the comment to Rule 1.2(a).

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Alternate Dispute Resolution

[5] There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.

Corresponding ABA Model Rule. Identical to Model Rule 1.4.

Corresponding Former Massachusetts Rule. None.

Rule 1.5 Fees.

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) (1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;

(2) the name and address of the lawyer or lawyers to be retained;

(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;

(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;

(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;

(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;

(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) (1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(1)-(3) shall not apply when the client is an organization, including a non-profit or governmental entity.

CONTINGENT FEE AGREEMENT, FORM A

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)

retains the Lawyer_____
(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work

done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures
Signatures of client and lawyer

(To client) _____
(Signature of client)

(To lawyer) _____
(Signature of lawyer)

CONTINGENT FEE AGREEMENT, FORM B

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)

retains the Lawyer_____
(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

(i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

(ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures
Signatures of client and lawyer

(To client) _____
(Signature of client)

(To lawyer) _____
(Signature of lawyer)

Comment

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of the rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the scope of the representation and the basis or rate of the fee is set forth. Ordinarily, the lawyer should send the written fee statement to the client before any substantial services are rendered. Where the client retains a lawyer for a single-session consultation or where the total fee to the client is reasonably expected to be less than $500, a writing is not required, although the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule. In determining whether a particular contingent fee is clearly excessive, or whether it is

reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] A lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B] The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client. Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C] When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D] A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model forms of contingent fee agreement specified in Rule 1.5(f)(1) and (2). However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in

property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[7A] Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f)(3), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the forms of contingent fee agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent, confirmed in writing.

Form of Fee Agreement

[10] Paragraph (f) provides model forms of contingent fee agreements and identifies explanations that a lawyer must provide to a client, except where the client is an organization, including a non-profit or governmental entity.

[11] Paragraphs (f)(1) and (f)(2) provide two forms of contingent fee agreement that may be used. Because paragraphs (3) and (7) of Form A do not contain alternative provisions, a lawyer who uses Form A does not need to provide any special explanation to the client. Paragraphs (2), (3), and (7) of Form B differ from Form A. While in most contingency cases, the contingency upon which compensation will be paid is recovery of damages, paragraph (2) of Form B permits lawyers and clients to agree to other lawful contingencies. A lawyer is not required to provide any special explanation when using paragraph (2). Paragraphs (3) and (7) of Form B allow options for the payment of costs and expenses and the payment of reasonable attorney's fees and expenses to former counsel. To ensure that a client gives informed consent to the agreed-upon option, a lawyer who uses Form B must retain in the form both options contained in paragraphs (3) and, where applicable, paragraph (7); show and explain these options to the client; and obtain the client's informed consent confirmed in writing to the selected option.

[12] Paragraph (f)(3) permits the lawyer and client to agree to modifications to Forms A and B, including modifications which are more favorable to the lawyer, to the extent permitted by this rule. However, a lawyer using a modified form of fee agreement must explain to the client any provisions that materially differ from or add to those contained in Forms A and B, and obtain the client's informed written consent. For purposes of this rule, an agreement that does not contain option (i) in paragraph (3) and, where applicable, option (i) in paragraph (7) of Form B is materially different, and a lawyer must explain those different or added provisions to the client, and obtain the client's informed written consent.

[13] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreements contained in Rule 1.5(f) state the default rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

Rule 1.6 Confidentiality of Information.

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3 (e);

(4) when permitted under these rules or required by law or court order.

(c) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (c) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this rule.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (and the related work product doctrine) in the law of evidence and the rule of confidentiality

established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to virtually all information relating to the representation, whatever its source. The term "confidential information" relating to representation of a client therefore includes information described as "confidences" and "secrets" in former DR 4-101(A) but without the limitation in the prior rules that the information be "embarrassing" or "detrimental" to the client. Former DR 4-101(A) provided: "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." See also Scope.

[5A] The word "virtually" appears in the fourth sentence of paragraph 5 above to reflect the common sense understanding that not every piece of information that a lawyer obtains relating to a representation is protected confidential information. While this understanding may be difficult to apply in some cases, some information is so widely available or generally known that it need not be treated as confidential. The lawyer's discovery that there was dense fog at the airport at a particular time does not fall within the rule. Such information is readily available. While a client's disclosure of the fact of infidelity to a spouse is protected information, it normally would not be after the client publicly discloses such information on television and in newspaper interviews. On the other hand, the mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule. A client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not generally known.

[5B] The exclusion of generally known or widely available information from the information protected by this rule explains the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words "or is generally known" in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in that subparagraph has been achieved more generally throughout the rules by the addition of the word "confidential" in this rule. It might be misleading to repeat the concept in just one specific subparagraph. Moreover, even information that is generally known may in some circumstances be protected, as when the client instructs the lawyer that generally known information, for example, spousal infidelity, not be revealed to a specific person, for example, the spouse's parent who does not know of it.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[7] A lawyer is authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. Rule 1.6(b)(4) has been added to make clear the purpose to carry forward the explicit statement of former DR 4-101(C)(2).

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Before accepting or continuing representation on such a basis, the lawyers to whom such restricted information will be communicated must assure themselves that the restriction will not contravene firm governance rules or prevent them from discovering disqualifying conflicts of interests.

Disclosure Adverse to Client

[9] One premise of the confidentiality rule is that to the extent a lawyer is required or permitted to disclose a client's confidential information, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. The implication of that premise is that generally the public will be better protected if full and open communication by the client is encouraged than if it is inhibited. Nevertheless, there are instances when the confidentiality rule is subject to exceptions.

[9A] Rule 1.6(b)(1) is derived from the original Kutak Commission proposal for the ABA Model Rules which permitted disclosure of confidential information to prevent criminal or fraudulent acts likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another. The former Massachusetts Disciplinary Rules permitted revelation of confidential information with respect to all crimes and all injuries, no matter how trivial. The use of the term "substantial" harm or injury restricts permitted revelation by limiting the permission granted to instances when the harm or injury is likely to be more than trivial or small. The reference to bodily harm is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm. Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.

[10] Several situations must be distinguished.

[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. See Rule 4.1, Comment 3. With regard to conduct before a tribunal, however, see the special meaning of the concept of assisting in Rule 3.3, Comment 2A.

[12A] When the lawyer's services have been used by the client to perpetrate a fraud, that is a perversion of the lawyer-client relationship and Rule 1.6(b)(3) permits the lawyer to reveal confidential information necessary to rectify the fraud.

[13] Third, the lawyer may have confidential information whose disclosure the lawyer reasonably believes is necessary to prevent the commission of a crime that is likely to result in death or substantial bodily or financial harm. As stated in paragraph (b)(1), the lawyer has professional

discretion to reveal such information. Before disclosure is made, the lawyer should have a reasonable belief that a crime is likely to be committed and that disclosure of confidential information is necessary to prevent it. The lawyer should not ignore facts that would lead a reasonable person to conclude that disclosure is permissible.

[13A] The language of paragraph (b)(1) has been changed from the ABA Model Rules version to permit disclosure of a client's confidential information when the harm will be the result of the activities of third parties as well as of the client.

[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this rule, but in particular circumstances, it might violate Rule 3.3(e) or Rule 4.1.

Withdrawal

[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client has already used the lawyer's services to commit fraud, the lawyer may reveal confidential information to rectify the fraud in accordance with Rule 1.6(b)(3).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6, Rule 3.3, Rule 4.1, and Rule 8.3. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[18] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Notice of Disclosure to Client

[19A] Whenever the rules permit or require the lawyer to disclose a client's confidential information, the issue arises whether the lawyer should, as a part of the confidentiality and loyalty obligation and as a matter of competent practice, advise the client beforehand of the plan to disclose. It is not possible to state an absolute rule to govern a lawyer's conduct in such situations. In some cases, it may be impractical or even dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact. Indeed, such revelation might thwart the reason for creation of the exception. It might hasten the commission of a dangerous act by a client or it might enable clients to prevent lawyers from defending themselves against accusations of lawyer misconduct. But there will be instances, such as the intended delivery of whole files to prosecutors to convince them not to indict the lawyer, where the failure to give notice would prevent the client from making timely objection to the revelation of too much confidential information. Lawyers will have to weigh the various policies and make reasonable judgments about the demands of loyalty, the requirements of competent practice, and the policy reasons for creating the exception to confidentiality in order to decide whether they should give advance notice to clients of the intended disclosure.

Disclosures Otherwise Required or Authorized

[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. Whether a lawyer should consider an appeal before complying with a court order depends on such considerations as the gravity of the harm to the client from compliance and the likelihood of prevailing on appeal.

[21] These rules in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.3, 3.3, 4.1, and 8.3. The reference to Rules 3.3, 4.1(b), and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these rules that deals with the disclosure of confidential information and that in some circumstances disclosure of such information may be required and not merely permitted. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Corresponding ABA Model Rule. (a) identical to Model Rule 1.6(a) except that the information must be confidential information; (b) different, in part taken from DR 4-101 (C); (c) based on DR 4-101 (E). Corresponding Former Massachusetts Rule. DR 4-101 (C), see also DR 7-102 (B).

Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 1.7 Conflict of Interest : General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even

if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest. Likewise, a lawyer should not accept referrals from a referral source, including law enforcement or court personnel, if the lawyer's desire to continue to receive referrals from that source or the lawyer's relationship to that source would or would reasonably be viewed as discouraging the lawyer from representing the client zealously.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. In criminal cases, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one codefendant, or more than one person under investigation by law enforcement authorities for the same transaction or series of transactions,

including any investigation by a grand jury. On the other hand, common representation of persons having similar interests is proper if the lawyer reasonably believes the risk of adverse effect is minimal and all persons have given their informed consent to the multiple representation, as required by paragraph (b).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. A lawyer representing the parent or a subsidiary of a corporation is not automatically disqualified from simultaneously taking an adverse position to a different affiliate of the represented party, even without consent. There may be situations where such concurrent representation will be possible because the effect of the adverse representation is insignificant with respect to the other affiliate or the parent and the management of the lawsuit is handled at completely different levels of the enterprise. But in many, perhaps most, cases, such concurrent representation will not be possible without consent of the parties.

[8A] The situation with respect to government lawyers is special, and public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to a private lawyer.

[9] A lawyer may ordinarily represent parties having antagonistic positions on a legal question that has arisen in different matters. However, the antagonism may relate to an issue that is so crucial to the resolution of a matter as to require that the clients be advised of the conflict and their consent obtained. On rare occasions, such as the argument of both sides of a legal question before the same court at the same time, the conflict may be so severe that a lawyer could not continue the representation even with client consent.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients

are generally aligned in interest even though there is some difference of interest among them. Thus, a lawyer may seek to establish or to adjust a relationship between clients on an amicable and mutually advantageous basis, for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[12A] In considering whether to represent clients jointly, a lawyer should be mindful that if the joint representation fails because the potentially conflicting interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. In some situations the risk of failure is so great that joint representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. A lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by joint representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[12B] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the client should be so advised.

[12C] As to the duty of confidentiality, while each client may assert that the lawyer keep something in confidence between the lawyer and the client, which is not to be disclosed to the other client, each client should be advised at the outset of the joint representation that making such a request will, in all likelihood, make it impossible for the lawyer to continue the joint representation. This is so because the lawyer has an equal duty of loyalty to each client. Each client has a right to expect that the lawyer will tell the client anything bearing on the representation that might affect that client's interests and that the lawyer will use that information to that client's benefit. But the lawyer cannot do this if the other client has sworn the lawyer to secrecy about any such matter. Thus, for the lawyer to proceed would be in derogation of the trust of the other client. To avoid this situation, at the outset of the joint representation the lawyer should advise both (or all) clients that the joint representation will work only if they agree to deal openly and honestly with one another on all matters relating to the representation, and that the lawyer will have to withdraw, if one requests that some matter material to the representation be kept from the other. The lawyer should advise the clients to consider carefully whether they are willing to share information openly with one another because above all else that is what it means to have one lawyer instead of separate representation for each.

[12D] In limited circumstances, it may be appropriate for a lawyer to ask both (or all) clients, if they want to agree that the lawyer will keep certain information confidential, i.e., from the other client. For example, an estate lawyer might want to ask joint clients if they each want to agree that in the eventuality that one becomes mentally disabled the lawyer be allowed to proceed with the joint

representation, appropriately altering the estate plan, without the other's knowledge. Of course, should that eventuality come to pass, the lawyer should consult Rule 1.14 before proceeding. However, aside from such limited circumstances, the lawyer representing joint clients should emphasize that what the clients give up in terms of confidentiality is twofold: a later right to claim the attorney-client privilege in disputes between them; and the right during the representation to keep secrets from one another that bear on the representation.

Consultation

[12E] When representing clients jointly, the lawyer is required to consult with them on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. When the lawyer is representing clients jointly, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[12F] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

[14A] A lawyer who undertakes to represent a class should make an initial determination whether subclasses within the class should have separate representation because their interests differ in material respects from other segments of the class. Moreover, the lawyer who initially determines that subclasses are not necessary should revisit that determination as the litigation or settlement discussions proceed because as discovery or settlement talks proceed the interests of subgroups within the class may begin to diverge significantly. The class lawyer must be constantly alert to such divergences and to whether the interests of a subgroup of the class are being sacrificed or undersold in the interests of the whole. The lawyer has the responsibility to request that separate representation be provided to protect the interests of subgroups within the class. In general, the lawyer for a class should not simultaneously represent individuals, not within the class, or other classes, in actions against the defendant being sued by the class. Such simultaneous representation invites defendants to propose global settlements that require the class lawyer to trade off the interest of the class against the interests of other groups or individuals. Given the difficulty of obtaining class consent and the difficulty for the class action court of monitoring the details of the other settlements, such simultaneous representation should ordinarily be avoided. In some limited circumstances, it may be reasonable for class counsel to represent simultaneously the class and another party or parties against

a common party if the other matter is not substantially related to the class representation and there is an objective basis for believing that the lawyer's representation will not be materially affected at any stage of either matter. For example, a lawyer might reasonably proceed if the common defendant were the government and the government's decision making in the class action was entrusted to a unit of the government highly unlikely to be affected by the decision maker for the government in the other matter.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Corresponding ABA Model Rule. Identical to Model Rule 1.7.

Corresponding Former Massachusetts Rule. DR 5-101 (A), 5- 105 (A) and (C), 5-107 (B).

Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 1.8 Conflict of Interest : Prohibited Transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client consents after consultation, except as Rule 1.6 or Rule 3.3 would permit or require.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Comment

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. [1A] Paragraph (b) continues the former prohibition contained in DR 4-101(B)(3) against a lawyer's using a client's confidential information not only to the disadvantage of the client but also to the advantage of the lawyer or a third person.

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

[4] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers

[6] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

[7] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Corresponding ABA Rule. Identical to Model Rule 1.8 except for paragraph (b).

Corresponding Former Massachusetts Rule. DR 4-101 (B) (2), DR 4-101 (B) (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107 (A) and (B), DR 5-108, DR 6-102. Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 1.9 Conflict of Interest : Former Client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter, unless the former client consents after consultation:

(1) use confidential information relating to the representation to the disadvantage of the former client, to the lawyer's advantage, or to the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working

presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm. [9] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client or to the advantage of the lawyer or a third party. See Rule 1.8(b) and Comment 1A to that Rule. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[13] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Corresponding ABA Model Rule. Identical to Model Rule 1.9 except for (c).

Corresponding Former Massachusetts Rule. DR 4-101 (B) and (C), DR 5-105; (c) no counterpart. Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 1.10 Imputed Disqualification : General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), or 1.9. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) When a lawyer becomes associated with a firm, the firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter (''material information"); or

(2) the personally disqualified lawyer (i) had neither substantial involvement nor substantial material information relating to the matter and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information which the personally disqualified lawyer has, has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the client relating to the matter, and any witness for or against the client;

(3) the personally disqualified lawyer and the firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

In any matter in which the former client and the person being represented by the firm with which the personally disqualified lawyer is associated are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional

Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

[5] Reserved.

Principles of Imputed Disqualification

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b), (d) and (e).

[7] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[8] Paragraphs (d) and (e) of Rule 1.10 are new. They apply when a lawyer moves from a private firm to another firm and are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (d) and (e) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's firm, to handle a matter with respect to which the disqualified lawyer was personally and substantially involved, or had substantial material information, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(d) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer's new firm.

[9] If the lawyer has no confidential information about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and

recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[10] If the lawyer does have material information about the representation of the client of his former firm, the firm with which he or she is associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer had no substantial involvement with the matter or substantial material information about the matter, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened.

[11] In situations where the personally disqualified lawyer was substantially involved in a matter, or had substantial material information, the new firm will generally only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the law firm consents and the firm reasonably believes that the representation will not be adversely affected, all as required by Rule 1.7. This differs from the provisions of Rule 1.11, in that Rule 1.11(a) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers was personally and substantially involved for that agency, provided that the procedures of Rule 1.11(a)(1) and (2) are followed. Likewise, Rule 1.11(b) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers had substantial material information even if that lawyer was not personally and substantially involved for that agency, provided that the lawyer is screened and not apportioned any part of the fee.

[12] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

Corresponding ABA Model Rule. (a) similar to Model Rule 1.10 (a) and last two sentences added; (b) and (c) identical to Model Rule 1.10(b) and (c); (d) & (e) new.

Corresponding Former Massachusetts Rule. See DR 5-105 (D) for last two sentences in (a); (b) – (e) no counterpart.

Rule 1.11 Successive Government and Private Employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, arbitrator, or mediator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. See Comment 8 to Rule 1.7. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Corresponding ABA Model Rule. Similar to Model Rule 1.11.

Corresponding Former Massachusetts Rule. (b) and (e) no counterpart; DR 9-101 (B). Cross-reference: See definition of "person" in Rule 9.1(h).

Rule 1.12 Former Judge or Arbitrator.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, or mediator. A lawyer serving as a law clerk to a judge, other adjudicative officer, arbitrator or mediator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, arbitrator, or mediator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited by these Rules from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The lawyer should also consider applicable statutes and regulations, e.g. M.G.L. Ch. 268A. The term "adjudicative officer" includes such officials as magistrates, referees, special masters, hearing officers and other parajudicial officers. Canon 8A(2) of the Code of Judicial Conduct (S.J.C. Rule 3:09) provides that a retired judge recalled to active service "should not enter an appearance nor accept an appointment to represent any party in any court of the Commonwealth for a period of six months following the date of retirement, resignation or most recent service as a retired judge pursuant to G.L. c. 32, §§ 65E-65G."

[2] Law clerks who serve before they are admitted to the bar are subject to the limitations stated in Rule 1.12 (b).

Corresponding ABA Model Rule. Similar to Model Rule 1.12.

Corresponding Former Massachusetts Rule. See DR 9-101 (A). Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 1.13 Organization as Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 9.1(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.

Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3, 4.1 or 8.3. Moreover, the lawyer may be subject to disclosure obligations imposed by law or court order as contemplated by Rule 1.6(b)(4). Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (4). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b)(1) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Nothing in these rules prohibits the lawyer from disclosing what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [4]. Although

in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14 Client with Diminished Capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client has diminished capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client has diminished capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer may also consult family members even though they may be personally interested in the situation. Before the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests. Decisions under Rule 1.14(b) whether and to what extent to consult or to disclose confidential information are matters of professional judgment on the lawyer's part.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rules 1.2(d), 1.6, 3.3 and 4.1.

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm, the attorney has four options. The attorney may:

i. advocate the client's expressed preferences regarding the issue;

ii. advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;

iii. request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or

iv. determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue and represent the client in accordance with that determination.

In the circumstances described in clause (iv) above where the matter is before a tribunal and the client has expressed a preference, the lawyer will ordinarily inform the tribunal of the client's expressed preferences. However, there are circumstances where options other than the option in clause (i) above will be impermissible under substantive law or otherwise inappropriate or unwarranted. Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters. Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15 Safekeeping Property.

(a) Definitions:

(1) "Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as "trust funds."

(2) "Trust account" means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this rule.

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer's own property.

(1) Trust funds shall be held in a trust account, except that advances for costs and expenses may be held in a business account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) Trust property other than funds shall be identified as such and appropriately safeguarded.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive.

(d) Accounting.

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal.

(e) Operational Requirements for Trust Accounts.

(1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words “trust account,” “escrow account,” “client funds account,” “conveyancing account,” “IOLTA account,” or words of similar import indicating the fiduciary nature of the account. Lawyers maintaining trust accounts shall take all steps necessary to inform the depository institution of the purpose and identity of such accounts.

(3) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to “cash” or “bearer” or by any other method which does not identify the recipient of the funds.

(4) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer’s law firm.

(5) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either (i) a pooled account (“IOLTA account”) for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank’s loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this rule.

(6) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this rule. As used in this subsection, “family member” refers to those individuals specified in section (e)(2) of rule 7.3.

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this subsection. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph 1G of this paragraph (f) or they may be prepared manually.

(1) Trust Account Records. The following books and records must be maintained for each trust account:

A. Account Documentation. A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with

interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or record for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date.

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. Account Documentation. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

(iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. Electronic Record Retention. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) Business Accounts. Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) Trust Property Other than Funds. A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(g) Interest on Lawyers' Trust Accounts.

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State-chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of $100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this rule as required by S.J.C. Rule 4:02, subsection (2).

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under Rule 1.15(h);

(iii) the encouragement of the banking community and the public to support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;

(v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and

(vii) reporting to the court in such manner as the court may direct.

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this rule.

(h) Dishonored Check Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days' notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this rule, and shall establish rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(6) The following definitions shall be applicable to this subparagraph:

(i) "Financial institution" includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase "in connection with a representation" includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property "in connection with a representation." Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property "in connection with a representation." However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property "in connection with a representation."

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in trust and the

lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[6] How much time should elapse between the receipt of funds by the lawyer and notice to the client or third person for whom the funds are held depends on the circumstances. By example, notice must be furnished immediately upon receipt of funds in settlement of a disputed matter, but a lawyer acting as an escrow agent or trustee routinely collecting various items of income may give notice by furnishing a complete statement of receipts and expenses on a regular periodic basis satisfactory to the client or third person.

Notice to a client or third person is not ordinarily required for payments of interest and dividends in the normal course, provided that the lawyer properly includes all such payments in regular periodic statements or accountings for the funds held by the lawyer.

[7] Paragraph (e)(3) states the general rule that all withdrawals and disbursements from trust accounts must be made in a manner which permits the recipient or payee of the withdrawal to be identified. It does not prohibit electronic transfers or foreclose means of withdrawal which may be developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[8] Paragraph (f) lists records that a lawyer is obliged to keep in order to comply with the requirement that "complete records" be maintained. Additional records may be required to document financial transactions with clients or third persons. Depending on the circumstances, these records could include retainer, fee, and escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[9] The "Check Register," "Individual Client Ledger" and "Ledger for Bank Fees and Charges" required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions which must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[10] Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts which only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person.

The method of preparation and form of the periodic reconciliation report will depend upon the volume of transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[11] Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

Corresponding ABA Model Rule. Different from Model Rule 1.15.

Corresponding Former Massachusetts Rule. DR 9-102, DR 9-103.

Rule 1.16 Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

(e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

(1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.

(2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials.

(3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

(4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.

(5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.

(6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

(7) notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Paragraph (c), taken from DR 2-110(A)(1) of the Code of Professional Conduct, has been substituted for ABA Model Rule 1.16(c) because it better states the principle of the need to obtain leave to withdraw.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] An appointed lawyer should advise a client seeking to discharge the appointed lawyer of the consequences of such an action, including the possibility that the client may be required to proceed pro se.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences under the provisions of Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

[10] Paragraph (e) preserves from DR 2-110(A)(4) detailed obligations that a lawyer has to make materials available to a former client.

Corresponding ABA Model Rule. Identical to Model Rule 1.16 (a) and (b); (c) is from DR 2-110 (A) (1); (d) is from the Model Rule but the last sentence is eliminated; (e) new, taken from DR 2-110 (A) (4).

Corresponding Former Massachusetts Rule. DR 2-109, DR 2-110.

Rule 1.17 Sale of Law Practice.

A lawyer or legal representative may sell, and a lawyer or law firm may purchase, with or without consideration, a law practice, including good will, if the following conditions are satisfied:

(a) [RESERVED]

(b) [RESERVED]

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the transfer of that client's representation will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[2] Reserved

[3] Reserved

[4] Reserved

[5] Reserved

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by

the purchaser, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

[10] Reserved

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

[16] ABA Model Rule 1.17(a) would require the seller to cease to engage in the practice of law in a geographical area. This is a matter for agreement between the parties to the transfer and need not be dictated by rule.

[17] ABA Model Rule 1.17(b) would require the sale of the entire practice. Under Rule 1.17, a lawyer may sell all or part of the practice.

[18] The language of the ABA Model Rule has also been changed to make clear that a law practice may be transferred and acquired without the necessity of a sale and that the client's consent referred to in Rule 1.17(c)(4) is only to the transfer of that client's representation.

[19] The rule permits the estate or representative of a lawyer to make a transfer of the lawyer's practice to one or more purchasers.

Corresponding ABA Model Rule. Substantially similar to Model Rule 1.17, except (a) and (b) eliminated.

Corresponding Former Massachusetts Rule. No counterpart.

COUNSELOR

Rule 2.1 Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if

the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Corresponding ABA Model Rule. Identical to Model Rule 2.1.

Corresponding Former Massachusetts Rule. No counterpart.

Rule 2.2 Intermediary [Reserved]

Comment

[1] ABA Model Rule 2.2 sets forth circumstances in which a lawyer may act as an intermediary between clients. The court concluded that a lawyer representing more than one client should be governed by the conflict of interest principles stated in Rule 1.7. Specific Massachusetts Comments 12 through 12F to Rule 1.7 provide guidance concerning the joint representation of clients.

Special Massachusetts Comment. See Special Massachusetts Comment to Rule 1.7 concerning joint representation.

Rule 2.3 Evaluation for use by Third Persons.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the

agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client- lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Corresponding ABA Model Rule. Identical to Model Rule 2.3.

Corresponding Former Massachusetts Rule. No counterpart.

Cross-reference: See definition of "consultation" in Rule 9.1 (c).

Rule 2.4 Lawyer Serving as Third-Party Neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute- resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. In particular, lawyers in Massachusetts may be subject to the Uniform Rules of Dispute Resolution set forth as Supreme Judicial Court Rule 1.18.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. See also Uniform Rule of Dispute Resolution 9(e) set forth in S.J.C. Rule 1.18.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 9.1(o)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Corresponding ABA Model Rule. Identical to Model Rule 2.4.

Corresponding Former Massachusetts Rule. No counterpart.

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The principle underlying the provision that a criminal defense lawyer may put the prosecution to its proof in all circumstances often will have equal application to proceedings in which the involuntary commitment of a client is in issue. The option granted to a criminal defense lawyer to defend the proceeding so as to require proof of every element of a crime does not impose an

obligation to do so. Sound judgment and reasonable trial tactics may reasonably indicate a different course.

Corresponding ABA Model Rule. Identical to Model Rule 3.1.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (1- 2), DR 7-106.

Rule 3.2 Expediting Litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Corresponding ABA Model Rule. Identical to Model Rule 3.2.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (1); see also DR 7-101, S.J.C. Rule 3:08, PF 2, DF 2.

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3 (e);

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3 (e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation; if the lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably

diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit, or assist the client in committing, a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Special Meaning of "Assistance"

[2A] Comment 3 to Rule 4.1 states the general rule that the word "assisting" refers to that level of assistance that would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. However, the concept of assisting has a special meaning in Rule 3.3 because it deals with a lawyer's conduct before a tribunal. The term assisting in Rule 3.3 is not limited to conduct that makes the lawyer liable as an aider, abettor or joint tortfeasor. Rule 3.3(a) is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against the contamination of the judicial process. Thus, for example, a lawyer who knows that a client has committed fraud on a tribunal and has refused to rectify it must disclose that fraud to avoid assisting the client's fraudulent act.

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, an advocate must disclose, if necessary to rectify the situation, the existence of the client's deception to the court or to the other party. The lawyer's obligation to disclose also extends to material evidence given by others on behalf of the client. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[7] In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. While there has been intense debate over a lawyer's duty in such situations in criminal cases, this rule proposes to accommodate these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial.

[8] In such cases, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjuriously. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application ex parte before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard in camera, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded.

[9] Once the trial has begun, the lawyer may seek to withdraw from the representation but no longer has an obligation to withdraw if the lawyer reasonably believes that to do so would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury.

[10] In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

[11] Reserved.

[12] Reserved.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.

Whether constitutional requirements affect the resolution of this issue is beyond the scope of these comments.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like.

[16] When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Corresponding ABA Model Rule. Identical in (a) to (d) to Model Rule 3.3 except in (a) (2) and (4); in (b) phrase "including all appeals" added; (e) new.

Corresponding Former Massachusetts Rule. DR 7-102, DR 7- 106 (B), S.J.C. Rule 3:08, PF 12, DF 13.

Rule 3.4 Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except

when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying

(2) reasonable compensation to a witness for loss of time in attending or testifying

(3) a reasonable fee for the professional services of an expert witness;

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter; or

(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5] Paragraph (g) carries over the provision of former DR 7- 109(C) concerning the payment of funds to a witness. Compensation of a witness may not be based on the content of the witness's testimony or the result in the proceeding. A lawyer may pay a witness reasonable compensation for time lost and for expenses reasonably incurred in attending the proceeding. A lawyer may pay a reasonable fee for the professional services of an expert witness.

[6] Paragraph (h) is taken from former DR 7-105(A), but it prohibits filing or threatening to file disciplinary charges as well as criminal charges solely to obtain an advantage in a private civil matter. The word "private" has been added to make clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government. This rule is never violated by a report under Rule 8.3 made in good faith because the report would not be made "solely" to gain an advantage in a civil matter.

[7] Paragraph (i) is taken from former DR 7-106(C)(8) concerning conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.

Corresponding ABA Model Rule. Identical to Model Rule 3.4(a), (b), (c), (d), (e), and (f); (g) from DR 7-109 (C), (h) from DR 7-105, and (i) from DR 7-106 (C) (8) are new.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (6); DR 7-105; DR 7-106 (A) and (C), DR 7-109, S.J.C. Rule 3:08 PF 4, DF 9; See also DR 7-103 (B), DR 7-104 (A)(2).

Rule 3.5 Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law;

(c) engage in conduct intended to disrupt a tribunal; or

(d) after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Corresponding ABA Model Rule. Identical to Model Rule 3.5(a), (b) and (c); (d) added from DR 7-108 (D).

Corresponding Former Massachusetts Rule. DR 7-106, DR 7- 108 (D), DR 7-110 (B), S.J.C. Rule 3:08, PF 1, DF 1.

Rule 3.6 Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) This rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be

considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Corresponding ABA Model Rule. Almost identical to Model Rule 3.6 except paragraph (e) is derived from DR 7-107 (I).

Corresponding Former Massachusetts Rule. DR 7-107.

Rule 3.7 Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Corresponding ABA Model Rule. Identical to Model Rule 3.7.

Corresponding Former Massachusetts Rule. DR 5-101 (B), DR 5-102 (A).

Rule 3.8 Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making

extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused;

(h) not assert personal knowledge of the facts in issue, except when testifying as a witness;

(i) not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and

(j) not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See also S.J.C. Rule 3:08, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Unlike the language of ABA Model Rule 3.8(c), paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term "accused" means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Paragraphs (h) and (i), which do not appear in the ABA Model Rules, are taken from DR 7-106(C)(3) and (4), respectively. They state limitations on a prosecutor's assertion of personal knowledge of facts in issue and the assertion of a personal opinion on matters before a trier of fact,

but under paragraph (i) a prosecutor may contend, based on the evidence, that the trier of fact should reach particular conclusions.

Corresponding ABA Model Rule. Model Rule 3.8, paragraphs (a) – (g) except for (c) (written waiver) and (f) (2) which is from former Model Rule 3.8 (f) (2) and S.J.C. Rule 3:08, PF 15; paragraphs (h) and (i) are taken from DR 7-106 (C) (3) and (4).

Paragraph (j) is taken from Rule 3:08, PF 7(b).

Corresponding Massachusetts Rule. See S.J.C. Rule 3:08, Standards Relating to the Prosecution Function.

Rule 3.9 Advocate in Nonadjudicative Proceedings.

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5(a) through (c).

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

[4] Unless otherwise expressly prohibited, ex parte contacts with legislators and other persons acting in a legislative capacity are not prohibited.

Corresponding ABA Model Rule. Identical to Model Rule 3.9, except for reference to paragraphs (a) – (c) of Rule 3.5.

Corresponding Former Massachusetts Rule. DR 7-106 (B)(2).

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. In paragraph (b) the word "assisting" refers to that level of assistance which would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. The requirement of disclosure in this paragraph is not intended to broaden what constitutes unlawful assistance under criminal, tort or agency law, but instead is intended to ensure that these rules do not countenance behavior by a lawyer that other law marks as criminal or tortious. But see the special meaning of "assistance" in the context of a lawyer's appearance before a tribunal in Comment 2A to Rule 3.3.

Corresponding ABA Model Rule. Identical to Model Rule 4.1.

Corresponding Former Massachusetts Rule. DR 1-102, DR 7- 102; see also DR 1-103.

Rule 4.2 Communication with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. Counsel could also prepare and send written default notices and written demands required by such laws as Chapter 93A of the General Laws.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. See the definition of "person" in Rule 9.1(h).

[4] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See the definition of "knowledge" in Rule 9.1(f). Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[7] Nothing in this rule prohibits a lawyer from seeking and acting in accordance with a court order permitting communication with a person known to be represented by counsel.

Corresponding ABA Model Rule. Identical to Model Rule 4.2.

Corresponding Former Massachusetts Rule. DR 7-104 (A) (1).

Cross-reference: See definition of "person" in Rule 9.1.

Rule 4.3 Dealing with Unrepresented Person.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) During the course of representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

> [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. Therefore Rule 4.3 continues the prohibition contained in former DR 1-104(A)(2) against giving advice to an unrepresented person, other than the advice to obtain counsel, when that person's interests are, or reasonably might be, in conflict with the interests of the lawyer's client. Nothing in this Rule, however, should be understood as precluding the lawyer from functioning in the normal representational role of advancing the client's position. Explaining the lawyer's own view of the meaning of a contract, for example, does not involve the giving of "advice" to an unrepresented person. Lawyers should be careful, however, to explain their roles to unrepresented persons to avoid the possibility of misunderstanding.

Corresponding ABA Model Rule. Paragraph (a) identical to Model Rule 4.3.

Corresponding Former Massachusetts Rule. No counterpart except (b) is taken from DR 7-104 (A) (2).

Rule 4.4 Respect for Rights of Third Persons.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

> [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Corresponding ABA Model Rule. Identical to Model Rule 4.4.

Corresponding Former Massachusetts Rule. DR 7-106 (C) (2); see also DR 1-102, 7-102(A).

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer.

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable

consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[5] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

Corresponding ABA Model Rule. Identical to Model Rule 5.1.

Corresponding Former Massachusetts Rule. None; but see DR 4-101 (D) and DR 7-107 (J).

Rule 5.2 Responsibilities of a Subordinate Lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Corresponding ABA Model Rule. Identical to Model Rule 5.2.

Corresponding Former Massachusetts Rule. None.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

> [1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Corresponding ABA Model Rule. Identical to Model Rule 5.3.

Corresponding Former Massachusetts Rule. None; but see DR 4-101 (D), DR 7-107 (J).

Rule 5.4 Professional Independence of a Lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if (i) the organization is one that is not for profit, (ii) the organization is tax-exempt under federal law, (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax exempt, and (iv) the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

(b) A lawyer shall not form a partnership or other business entity with a nonlawyer if any of the activities of the entity consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a limited liability entity authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is an officer, or a corporate director or limited liability company manager thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements must not interfere with the lawyer's professional judgment. See Comment 10 to Rule 1.7.

[2] Rule 5.4(a)(4) explicitly permits a lawyer, with the client's consent, to agree to share certain fees with a tax-exempt, non-profit qualified legal assistance organization that has referred the matter to the lawyer. The interest that such a charitable or public purpose organization has in the successful pursuit of litigation advancing an aim of the organization related to its tax exemption lessens significantly the danger of the abuses of fee-sharing between lawyers and nonlawyers that this Rule is designed to prevent. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers. Should abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(d) or (h). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5(e). The permission granted by this Rule does

not extend to fees generated in connection with proceedings not related to the purpose for which the organization is tax-exempt, such as generating business income for the organization.

Corresponding ABA Model Rule. Identical to Model Rule 5.4, except for subclause (4) of paragraph (a) which is new, and except for changes to paragraphs (b) and (d).

Corresponding Former Massachusetts Rule. DR 3-102, DR 3- 103, DR 5-107 (B) and (C); see also DR 3-101 (A).

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law in this jurisdiction only if admitted to practice generally or if authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous, for example by placing a name on the office door or letterhead of another lawyer without qualification, even if the lawyer is not physically present here. A lawyer not admitted to practice in this jurisdiction must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of the lawyer's clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) and (d) means the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in this jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple

jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees that are unrelated to their employment. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The nature of the relationship between the lawyer and client provides a sufficient safeguard that the lawyer is competent to advise regarding the matters for which the lawyer is employed.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for appropriate fees and charges.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in this jurisdiction even though not admitted when the lawyer is authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not admitted to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Rule 5.6 Restrictions on Right to Practice.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy.

Comment

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client. The prohibition applies to matters in which the government is a party as well as to purely private disputes.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Corresponding ABA Model Rule. Identical to Model Rule 5.6, except reference to private parties deleted at the end of paragraph (b).

Corresponding Former Massachusetts Rule. DR 2-108.

Rule 5.7 Responsibilities Regarding Law-Related Services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain

professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client- lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the lawrelated services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer

employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.5, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Corresponding ABA Model Rule. Identical to Model Rule 5.7.

Corresponding Former Massachusetts Rule. None.

PUBLIC SERVICE

Rule 6.1 Voluntary Pro Bono Publico Service.

A lawyer should provide annually at least 25 hours of pro bono publico legal services for the benefit of persons of limited means. In providing these professional services, the lawyer should:

(a) provide all or most of the 25 hours of pro bono publico legal services without compensation or expectation of compensation to persons of limited means, or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means. The lawyer may provide any remaining hours by delivering legal services at substantially reduced compensation to persons of limited means or by participating in activities for improving the law, the legal system, or the legal profession that are primarily intended to benefit persons of limited means; or,

(b) contribute from $250 to 1% of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, should provide legal services to persons of limited means. This rule sets forth a standard which the court believes each member of the Bar of the Commonwealth can and should fulfill. Because the rule is aspirational, failure to provide the pro bono publico services stated in this rule will not subject a lawyer to discipline. The rule calls on all lawyers to provide a minimum of 25 hours of pro bono publico legal services annually. Twenty-five hours is one-half of the number of hours specified in the ABA Model Rule 6.1 because this Massachusetts rule focuses only on legal activity that benefits those unable to afford access to the system of justice. In some years a lawyer may render greater or fewer than 25 hours but during the course of his or her legal career, each lawyer should render annually, on average, 25 hours. Also, it may be more feasible to act collectively, for example, by a firm's providing through one or more lawyers an amount of pro bono publico legal services sufficient to satisfy the aggregate amount of hours expected from all lawyers in the firm. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation.

[2] The purpose of this rule is to make the system of justice more open to all by increasing the pro bono publico legal services available to persons of limited means. Because this rule calls for the provision of 25 hours of pro bono publico legal services annually, instead of the 50 hours per year specified in ABA Model Rule 6.1, the provision of the ABA Model Rule regarding service to non-profit organizations was omitted. This omission should not be read as denigrating the value of the voluntary service provided to non-profit community and civil rights organizations by many lawyers. Such services are valuable to the community as a whole and should be continued. Service on the boards of non-profit arts and civic organizations, on school committees, and in local public office are but a few examples of public service by lawyers. Such activities, to the extent they are not directed at meeting the legal needs of persons of limited means, are not within the scope of this rule. While the American Bar Association Model Rule 6.1 also does not credit general civic activities, it explicitly provides that some of a lawyer's pro bono publico obligation may be met by legal services provided to vindicate "civil rights, civil liberties and public rights." Such activities, when undertaken on behalf of persons of limited means, are within the scope of this rule.

[3] Paragraph (a) describes the nature of the pro bono publico legal services to be rendered annually under the rule. Such legal services consist of a full range of activities on behalf of persons of limited means, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, community legal education, and the provision of free training or mentoring to those who represent persons of limited means.

[4] Persons eligible for pro bono publico legal services under this rule are those who qualify for publicly-funded legal service programs and those whose incomes and financial resources are above the guidelines used by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations composed of low-income people, to organizations that serve those of limited means such as homeless shelters, battered women's centers, and food pantries or to those organizations which pursue civil rights, civil liberties, and public rights on behalf of persons of limited means. Providing legal advice, counsel and assistance to an organization consisting of or serving persons of limited means while a member of its board of directors would be pro bono publico legal services under this rule.

[5] In order to be pro bono publico services under the first sentence of Rule 6.1(a), services must be provided without compensation or expectation of compensation. The intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of this paragraph. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected. The award of statutory attorneys' fees in a case accepted as a pro bono case, however, would not disqualify such services from inclusion under this section.

[6] A lawyer should perform pro bono publico services exclusively or primarily through activities described in the first sentence of paragraph (a). Any remaining hours can be provided in the ways set forth in the second sentence of that paragraph including instances in which an attorney agrees to receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments and provision of services to individuals when the fee is substantially below a lawyer's usual rate are encouraged under this sentence.

[7] The variety of activities described in Comment [3] should facilitate participation by government and corporate attorneys, even when restrictions exist on their engaging in the outside practice of law. Lawyers who by the nature of their positions are prohibited from participating in the activities described in the first sentence of paragraph (a) may engage in the activities described in the second sentence of paragraph (a) or make a financial contribution pursuant to paragraph (b).

[8] The second sentence of paragraph (a) also recognizes the value of lawyers engaging in activities, on behalf of persons of limited means, that improve the law, the legal system, or the legal profession. Examples of the many activities that fall within this sentence, when primarily intended to benefit persons of limited means, include: serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system, or the profession.

[9] Lawyers who choose to make financial contributions pursuant to paragraph (b) should contribute from $250 to 1% of the lawyer's adjusted net Massachusetts income from legal professional activities. Each lawyer should take into account his or her own specific circumstances and obligations in determining his or her contribution.

Corresponding ABA Model Rule. Different from Model Rule 6.1.

Corresponding Former Massachusetts Rule. None.

Rule 6.2 Accepting Appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. For example, a lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Corresponding ABA Model Rule. Identical to Model Rule 6.2.

Corresponding Former Massachusetts Rule. None.

Rule 6.3 Membership in Legal Services Organization.

A lawyer may serve as a director, officer, or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Corresponding ABA Model Rule. Identical to Model Rule 6.3.

Corresponding Former Massachusetts Rule. None.

Rule 6.4 Law Reform Activities Affecting Client Interests.

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Corresponding ABA Model Rule. Identical to Model Rule 6.4.

Corresponding Former Massachusetts Rule. None. But see G. L. c. 211D, § 1, as to members of the Committee for Public Counsel Services.

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is not subject to Rule 1.5(b);

(2) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(3) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(3). Paragraph (a)(3) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Corresponding ABA Model Rule. Identical to Model Rule 6.5.

Corresponding Former Massachusetts Rule. No counterpart.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

> [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. Statements that compare a lawyer's services with another lawyer's services and statements that create unjustified expectations about the results the lawyer can achieve would violate Rule 7.1 if they constitute "false or misleading" communications under the Rule.

Corresponding ABA Model Rule. Identical to Model Rule 7.1(a).

Corresponding Former Massachusetts Rule. DR 2-101 (A).

Rule 7.2 Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory including an electronic or computer-accessed directory, newspaper or other periodical, outdoor advertising, radio or television, or through written, electronic, computer-accessed or similar types of communication not involving solicitation prohibited in Rule 7.3.

(b) A copy or recording of an advertisement or written communication of services offered for a fee shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization;

(3) pay for a law practice in accordance with Rule 1.17;

(4) pay referral fees permitted by Rule 1.5 (e); and

(5) share a statutory fee award or court-approved settlement in lieu thereof with a qualified legal assistance organization in accordance with Rule 5.4(a)(4).

(d) Any communication made pursuant to this rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.

[2] [Reserved]

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television and other electronic media, including computer-accessed communications, are now among the most powerful media for getting information to the public. Prohibiting such advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. For example, when a targeted e-mail solicitation of a person known to be in need of legal services contains a hot-link to a home page, the email message is subject to Rule 7.3 but the home page itself need not be because the recipient must make an affirmative decision to go to the sender's home page. Depending upon the circumstances, posting of comments to a newsgroup, bulletin board or chat group may constitute targeted or direct contact with prospective clients known to be in need of legal services and may therefore be subject to Rule 7.3. Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of the lawyer or law firm's name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule. In addition, if the lawyer or law firm uses an interactive forum such as a chat group to solicit for a fee professional employment that the prospective client has not requested, this conduct may constitute prohibited personal solicitation under Rule 7.3(d).

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph

(c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Paragraph (c) also excepts from its prohibition the referral fees permitted by Rule 1.5(e).

Corresponding ABA Model Rule. Substantially similar to Model Rule 7.2, except minor differences in (a) and (b) , subclauses (4) and (5) were added to paragraph (c), and paragraph (d) was modified.

Corresponding Former Massachusetts Rule. DR 2-101 (B); see DR 2-103.

Rule 7.3 Solicitation of Professional Employment.

(a) In soliciting professional employment, a lawyer shall not coerce or harass a prospective client and shall not make a false or misleading communication.

(b) A lawyer shall not solicit professional employment if:

(1) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer, provided, however, that this prohibition shall not apply to solicitation not for a fee; or

(2) the prospective client has made known to the lawyer a desire not to be solicited.

(c) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client known to be in need of legal services in a particular matter by written communication, including audio or video cassette or other electronic communication, unless the lawyer retains a copy of such communication for two years.

(d) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client in person or by personal communication by telephone, electronic device, or otherwise.

(e) The following communications shall be exempt from the provisions of paragraphs (c) and (d) above:

(1) communications to members of the bar of any state or jurisdiction;

(2) communications to individuals who are (A) the grandparents of the lawyer or the lawyer's spouse, (B) descendants of the grandparents of the lawyer or the lawyer's spouse, or (C) the spouse of any of the foregoing persons;

(3) communications to prospective clients with whom the lawyer had a prior attorney-client relationship; and

(4) communications with (i) organizations, including non-profit and governmental entities, in connection with the activities of such organizations, and (ii) with persons engaged in trade or

commerce as defined in G. L. c. 93A, § 1 (b), in connection with such persons' trade or commerce.

(f) A lawyer shall not give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client. However, this rule does not prohibit a lawyer or a partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any qualified legal assistance organization. Such requests for referrals or cooperation may include a sharing of fee awards as provided in Rule 5.4(a)(4).

Comment

[1] This rule applies to solicitation, the obtaining of business through letter, e-mail, telephone, in-person or other communications directed to particular prospective clients. It does not apply to non-targeted advertising, the obtaining of business through communications circulated more generally and more indirectly than that, such as through web sites, newspapers, or placards in mass transit vehicles. This rule allows lawyers to conduct some form of solicitation of employment from all prospective clients, except in a small number of very special circumstances, and hence permits prospective clients to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal solicitation in the circumstances prohibited by this rule and seeks to limit them by regulating the form and manner of solicitation by rules that reach no further than the danger that is perceived.

[2] Paragraphs (a) and (b) apply whenever a lawyer is engaging in solicitation that is not prohibited under another paragraph of this Rule. In determining whether a contact is permissible under Rule 7.3(b)(1), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. The reference to the "physical, mental, or emotional state of the prospective client" is intended to be all-inclusive of the condition of such person and includes a prospective client who for any reason lacks sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (b)(1) makes clear that it is not intended to reduce the ability possessed by non-profit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations would probably constitute a violation of paragraph (a) of the rule or Rule 8.4(c), (d), or (h). The references in paragraph (b)(1), (c), and (d) of the rule to solicitation "for a fee" are intended to carry forward the exemption in DR 2-103 for non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the rule. There is no blanket exemption from regulation for all solicitation that is not done "for a fee." Non-profit organizations are subject to the general prohibitions of paragraphs (a) and (f) and subparagraph (b)(2).

[3] Paragraph (c) imposes minimum regulations on solicitation by certain written and other communication that is not interactive. Copies of such solicitations must be retained for two years. Paragraph (c) applies only in situations where the person is known to be in need of services in a particular matter. For purposes of paragraph (c) a prospective client is "known to be in need of legal services in a particular matter" in circumstances including, but not limited to, all instances in which the communication by the lawyer concerns an event specific to the person solicited that is pending or has already occurred, such as a personal injury, a criminal charge, or a real estate purchase or foreclosure.

[4] While paragraph (c) permits written and other nondirect solicitation of any prospective client, except under the special circumstances set forth in paragraphs (a) and (b), paragraph (d) prohibits solicitation in person or by personal communication except in the situations described in paragraph (e). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through chat groups or other interactive computer-accessed or similar types of communications. The prohibitions of paragraph (d) do not, of course, apply to in-person solicitation after contact has been initiated by the prospective client.

[4A] Paragraph (e) acknowledges that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the prospective client is a former client or a member of the lawyer's immediate family. The word "descendant" is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, non-profit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business. Subparagraph (e)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organizations, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.

[5] Paragraph (f) prohibits lawyers paying a person or organization to solicit on their behalf. The provision should be read together with Rule 8.4(a), which prohibits a lawyer from violating these rules through the acts of another. The rule contains an exception for requests for referrals from described organizations.

Corresponding ABA Model Rule. Different from Model Rule 7.3.

Corresponding Former Massachusetts Rule. DR 2-103.

Rule 7.4 Communication of Fields of Practice.

(a) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the holding out does not include a false or misleading communication. Such holding out includes (1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and (3) any other association of the lawyer's name with a particular service, field, or area of law.

(b) Lawyers who hold themselves out as "certified" in a particular service, field, or area of law must name the certifying organization and must state that the certifying organization is "a private organization, whose standards for certification are not regulated by the Commonwealth of Massachusetts," if that is the case, or, if the certifying organization is a governmental body, must name the governmental body.

(c) Except as provided in this paragraph, lawyers who associate their names with a particular service, field, or area of law imply an expertise and shall be held to the standard of performance of specialists in that particular service, field, or area. Lawyers may limit responsibility with

respect to a particular service, field, or area of law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they "handle" or "welcome" cases, "but are not specialists in" a specific service, field, or area of law.

Comment

[1] This Rule is substantially similar to DR 2-105 which replaced a rule prohibiting lawyers, except for patent, trademark, and admiralty lawyers, from holding themselves out as recognized or certified specialists. The Rule removes prohibitions against holding oneself out as a specialist or expert in a particular field or area of law so long as such holding out does not include any false or misleading communication but provides a broad definition of what is included in the term "holding out." See also Comment 3A to Rule 7.2, discussing computer-accessed or other similar types of newsgroups, bulletin boards, and chat groups. The phrase "false or misleading communication", defined in Rule 7.1, replaces the phrase "deceptive statement or claim" in DR 2-105 to conform to the terminology of Rules 7.1 and 7.3. The Rule merely expands to all claims of expertise the language of the former rule, which permitted nondeceptive statements about limiting practice to, or concentrating in, specified fields or areas of law. There is no longer any need to deal specifically with patent, trademark, or admiralty specialization. To the extent that such practices have fallen within federal jurisdiction, they will continue to do so.

[2] The Rule deals with the problem that the public might perceive that the Commonwealth is involved in certification of lawyers as specialists. It therefore requires lawyers holding themselves out as certified to identify the certifying organization with specifically prescribed language when it is a private organization and to name the certifying governmental organization when that is the case. Nothing in the Rule prevents lawyers from adding truthful language to the prescribed language.

[3] The Rule also specifies that lawyers who imply expertise in a particular field or area of law should be held to the standard of practice of a recognized expert in the field or area. It gives specific examples of commonly used forms of advertising that fall within that description. The Rule also recognizes that there may be good reasons for lawyers to wish to associate their names with a particular field or area of law without wishing to imply expertise or to accept the responsibility of a higher standard of conduct. Such a situation might describe, for example, a lawyer who wishes to develop expertise in a particular or field area without yet having it. The Rule identifies specific language that might be used to avoid any implication of expertise that would trigger the imposition of a higher standard of conduct.

Corresponding ABA Model Rule. Different from Model Rule 7.4.

Corresponding Former Massachusetts Rule. DR 2-105.

Rule 7.5 Firm Names and Letterheads.

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

Corresponding ABA Model Rule. Identical to Model Rule 7.5.

Corresponding Former Massachusetts Rule. DR 2-102.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Corresponding ABA Model Rule. Identical to Model Rule 8.1.

Corresponding Former Massachusetts Rule. DR 1-101; see also DR 1-102.

Rule 8.2 Judicial and Legal Officials.

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial or legal offices. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] ABA Model Rule 8.2(b) is inapplicable in Massachusetts since judges are not elected.

Corresponding ABA Model Rule. Different from Model Rule 8.2.

Corresponding Former Massachusetts Rule. DR 8-102.

Rule 8.3 Reporting Professional Misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct.

(c) This rule does not authorize disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program, as defined in Rule 1.6(c), to the extent that such information would be confidential if it were communicated by a client.

Comment

[1] This rule requires lawyers to report serious violations of ethical duty by lawyers and judges. Even an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required or permitted where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] While a measure of judgment is required in complying with the provisions of this Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime" as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and . . . any lesser crime a necessary element of which . . . includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit [such a crime]." In addition to a conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A lawyer has knowledge of a violation when he or she possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not. A report should be made to Bar Counsel's office or to the Judicial Conduct Commission, as the case may be. Rule 8.3 does not preclude a lawyer from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory.

[3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is

ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

[4] The duty to report past professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a lawyer assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs. Failure to do so may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule, therefore, exempts the lawyer from reporting requirements of paragraphs (a) and (b) with respect to information that would be protected by Rule 1.6 if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer.

Corresponding ABA Model Rule. Model Rule 8.3.

Corresponding Former Massachusetts Rule. None. [DR 1-103 (A) was not adopted in Massachusetts].

Rule 8.4 Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in Supreme Judicial Court Rule 4:01, § 3; or

(h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

Comment

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[3] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyer. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[4] Paragraph (e) prohibits the acceptance of referrals from a referral source, such as court or agency personnel, if the lawyer states or implies, or the client could reasonably infer, that the lawyer has an ability to influence the court or agency improperly.

[5] Paragraph (h) carries forward the provision of Former DR 1-102(A)(6) prohibiting conduct that adversely reflects on that lawyer's fitness to practice law, even if the conduct does not constitute a criminal, dishonest, fraudulent or other act specifically described in the other paragraphs of this rule.

Corresponding ABA Model Rule. Clauses (a), (b), (c), (d), (e), and (f) identical to Model Rule 8.4; clause (g) incorporates obligations set forth in S.J.C. Rule 4:01, § 3; clause (h) comes from DR 1- 102 (A) (6).

Corresponding Former Massachusetts Rule. DR 1-102, DR 9- 101 (C). See S.J.C. Rule 4:01, § 3.

Rule 8.5 Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a governmental tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's principal office is located shall be applied, unless the predominant effect of the conduct is in a different jurisdiction, in which case the rules of that jurisdiction shall be applied. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

[1A] In adopting Rule 5.5, Massachusetts has made it clear that out-of-state lawyers who engage in practice in this jurisdiction are subject to the disciplinary authority of this state. A great many states have rules that are similar to, or identical with, Rule 5.5, and Massachusetts lawyers therefore need to be aware that they may become subject to the disciplinary rules of another state in certain circumstances. Rule 8.5 deals with the related question of the conflict of law rules that are to be applied when a lawyer's conduct affects multiple jurisdictions. Comments 2-7 state the particular principles that apply.

[1B] There is no completely satisfactory solution to the choice of law question so long as different states have different rules of professional responsibility. When a lawyer's conduct has an effect in another jurisdiction, that jurisdiction may assert that its law of professional responsibility should govern, whether the lawyer was physically present in the jurisdiction or not.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, paragraph (b) provides that any particular act of a lawyer shall be subject to only one set of rules of professional conduct, makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of the appropriate regulatory interests of relevant jurisdictions, and provides protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a government tribunal, the lawyer shall be subject only to the rules of the government tribunal, if any,

or of the jurisdiction in which the government tribunal sits unless the rules of that tribunal, including its choice of law rule, provide otherwise. By limiting application of the rule to matters before a government tribunal, e.g. a court or administrative agency, parties may establish which disciplinary rules will apply in private adjudications such as arbitration.

[4A] As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, the choice of law is governed by paragraph (b)(2). Paragraph (b)(2) creates a "default" choice of the rules of the jurisdiction in which the lawyer's principal office is located. There are several reasons for identifying such a default rule. First, the jurisdiction where the lawyer principally practices has a clear regulatory interest in the conduct of such lawyer, even in situations where the lawyer's conduct affects other jurisdictions. Second, lawyers are likely to be more familiar with the rules of the jurisdiction where they principally practice than with rules of another jurisdiction, even if licensed in that other jurisdiction. Indeed, most lawyers will be licensed in the jurisdiction where they principally practice, and familiarity with a jurisdiction's ethical rules is commonly made a condition of licensure. Third, in many situations, a representation will affect many jurisdictions, such as a transaction among multiple parties who reside in different jurisdictions involving performance in yet other jurisdictions. The selection of any of the jurisdictions that are affected by the representation will often be problematic.

[4B] There will be some circumstances, however, where the predominant effect of the lawyer's conduct will clearly be in a jurisdiction other than the jurisdiction in which the lawyer maintains his or her principal office. Accordingly, paragraph (b)(2) provides that when the predominant effect of the lawyer's conduct is in a jurisdiction other than the jurisdiction in which the lawyer's principal office is located, the ethical rules of such other jurisdiction apply to such conduct. For example, when litigation is contemplated but not yet instituted in another jurisdiction, a lawyer whose principal office is in this jurisdiction may well find that the rules of that jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in that jurisdiction. Likewise, under Rule 8.5(b), when litigation is contemplated and not yet begun in this jurisdiction, a lawyer whose principal office is in another jurisdiction may well find that the rules of this jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in this jurisdiction.

[4C] A lawyer who serves as in-house counsel in this jurisdiction pursuant to Rule 5.5, and whose principal office is in this jurisdiction will be subject to the rules of this jurisdiction unless the predominant effect of his or her conduct is clearly in another jurisdiction.

[5] The application of these rules will often involve the exercise of judgment in situations in which reasonable people may disagree. So long as the lawyer's conduct reflects an objectively reasonable application of the choice of law principles set forth in paragraph (b), the lawyer shall not be subject to discipline under this Rule.

[6] If this jurisdiction and another jurisdiction were to proceed against a lawyer for the same conduct, they should identify and apply the same governing ethics rules. Disciplinary authorities in this jurisdiction should take all appropriate steps to see that they do apply the same rule to the same conduct as authorities in other jurisdictions, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Moreover, no lawyer should be subject to discipline in this jurisdiction for violating the regulations governing advertising or solicitation of a non-U.S. jurisdiction where the conduct would be constitutionally protected if performed in this jurisdiction.

DEFINITIONS; TITLE

Rule 9.1 Definitions.

The following definitions are applicable to the Rules of Professional Conduct:

(a) "Bar association" includes an association of specialists in particular services, fields, and areas of law.

(b) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. The term includes a partnership, including a limited liability partnership, a corporation, a limited liability company, or an association treated as a corporation, authorized by law to practice law for profit.

(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

(h) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(i) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

(j) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(k) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(l) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(m) “State” includes the District of Columbia, Puerto Rico, and federal territories or possessions.

(n) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(o) “Tribunal” includes a court or other adjudicatory body.

Comment

[1] See Comments 1-3 to Rule 1.10 for further information on the definition of “firm.”

[2] In addition to the terms defined in this rule, there are two other important concepts whose meaning is discussed at some length at other places in these rules. The terms “assist” and “assisting” appear in Rules 1.2(d), 3.3(a)(2) and 4.1(b). Comment 3 to Rule 4.1 sets forth the meaning of these terms with respect to conduct proscribed in Rules 1.2(d) and 4.1(b), and Comment 2A to Rule 3.3 sets forth the special meaning of those terms in the context of a lawyer’s appearance before a tribunal. The term “confidential information” is also used in the rules to describe the information that lawyers shall not reveal unless required or permitted under these rules. As Comment 5, 5A and 5B to Rule 1.6 indicate, confidential information includes “virtually” all information relating to the representation whatever its scope. It therefore includes information described as confidences and secrets under the prior Massachusetts Disciplinary Rules without the limitation in the prior rules that the information be “embarrassing” or “detrimental” to the client. As pointed out in Comment 5A, however, a lawyer may learn some information in the course of representation that is so widely known that it ought not be considered confidential.

[3] The final category of qualified legal assistance organization requires that the organization “receives no profit from the rendition of legal services.” That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court awarded fee that would result in a “profit” from that particular lawsuit.

Corresponding ABA Model Rule. The definitions are largely taken from the “Terminology” of the ABA Model Rules which is not a numbered rule.

Rule 9.2 Title.

These rules may be known and cited as the Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.).

Corresponding ABA Model Rule. None.

IOLTA Guidelines.
http://www.maiolta.org/attorneys/index_3_3062607528.pdf

3:08 Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer.

[Repealed effective January 1, 1999]

3:09 Code of Judicial Conduct.

PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, and Commentary. The text of the Canons and the Sections, including the Terminology Section, is authoritative, that is, it is intended to impose binding obligations the violation of which can result in disciplinary action. The Commentary, by explanation and example, provides interpretive guidance with respect to the obligations of the Canons and Sections. At times the Commentary also offers aspirational goals.

When the text of the Canons, Sections, or Commentary uses "shall" or "shall not," it is intended to be authoritative. When "should" or "should not" is used (in Commentary) the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Code must be read as a whole. Judges must be alert to the possibility that more than one Canon or Section may apply to a particular situation. As an example, before concluding that an action appears to be permitted by one of the more detailed provisions of the Code, the judge should consider whether, in the circumstances, the action is improper when measured against a more general provision, for instance, Section 2A. Occasionally a provision of the Code is explicitly stated as being "subject to the requirements of this Code," or similar language. The absence of language to that effect elsewhere should not lull the judge into indifference to the rest of the Code when the judge focuses on a particular provision; every provision is subject to every other provision.

The Canons and Sections are rules of reason. Some conduct that may literally violate a provision of this Code will be permissible because it does not violate the policy behind the prohibition or is

de minimis. In addition, not every violation of the Code should result in disciplinary action. Whether disciplinary action is appropriate, and, if it is, what degree of discipline should be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the existence (or not) of a pattern of improper activity, and the effect of the improper activity on others, on the public perception of others, or on the judicial system.

The Code is not intended as an exhaustive guide for the conduct of judges. For example, judges' conduct is also governed by constitutional requirements, statutes, court rules, and decisional law. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions. The Code is intended to state basic standards which govern the conduct of all judges and to assist judges in establishing and maintaining high standards of judicial and personal conduct.

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the Sections where they appear. In addition, the Sections where the terms appear are referred to after the explanation of each term below. Terms are not asterisked in Commentary or in this Terminology Section.

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(4), 3B(5), 3B(7)(c), 3B(7)(c)(i), 3B(9), 3C(1), and 3C(2).

"De minimis" denotes an insignificant interest and therefore one that does not raise a reasonable question as to a judge's impartiality. See Sections 3E(1)(f), (g) and (h).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, except that:

(i) ownership in a mutual or common investment fund that holds securities is not an "economic interest" in such securities unless the judge participates in the management of the fund; a judge is not required to inquire as to the identity of the securities held by the fund.

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse or child wherever residing, or by any other member of the judge's family residing in the judge's household, as an officer, director, advisor or other active participant in any organization does not create an "economic interest" in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member of a credit union, or a similar proprietary interest, is not an "economic interest" in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an "economic interest" in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities. See Sections 3E(1)(f) and (g).

"Ex parte communication" denotes a communication, which occurs without notice to or participation by all other parties or lawyers for all other parties to the proceeding, between a judge (or by court staff on behalf of a judge) and (i) a party or a party's lawyer or (ii) another person who is not a participant in the proceeding. See Sections 3B(7), 3B(7)(a), 3B(7)(a) (i) and (ii) and 3B(7)(e).

"Fiduciary"denotes an executor, administrator, trustee, guardian and other similar positions. See Sections 3E(1)(f), 4E, 4E(2), and 4E(3).

"Knowingly," "knowledge," "known" or "knows" denote actual knowledge of the fact in question. That a person has actual knowledge may be inferred from circumstances. See Sections 3B(7)(c)(iv), 3B(11), 3D(1), 3D(2), 3E(1)(d),(e),(f),(g) and (h).

"Law" denotes court rules as well as statutes, constitutional provisions, and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 3B(7)(b), 3B(7)(e), 3B(11), 4C(1), 4C(2), 4C(3), 4C(3)(b)(ii), 4D(5)(a), 4H(2), 4I, and 5A(3).

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood, adoption, or marriage, a domestic partner, or a person with whom the judge maintains a close familial relationship, who resides in the judge's household. See Sections 3E(1)(g), 4D(5), and 4D(5)(b).

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office or passage of ballot questions. See Sections 5A(1)(a), (b), and (c).

"Relationship interest" denotes a relationship as an officer, director, advisor, or other active participant in the affairs of a party that has more than a de minimis legal or equitable interest. See Sections 3E(1)(f) and (g).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(4), 3B(5), 3B(6), 3B(9) and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Section 3E(1)(h).

CANON 1 : A Judge Shall Uphold the Integrity and Independence of the Judiciary.

(A) An independent and honorable judiciary is indispensable to justice in our society. A judge shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards, so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

A judicial decision or action determined by an appellate court to be incorrect either as a matter of law or as an abuse of discretion is not a violation of this Code unless the decision or action is committed knowingly and in bad faith.

CANON 2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities.

(A) A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. The test for imposition of sanction for violation of this Canon is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

(B) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness in an adjudicatory proceeding.

Commentary

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead and the judicial title must not be used in conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of the judge or of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writing, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

A judge should be careful to avoid developing excessively close relationships with frequent litigants – such as municipal attorneys, police prosecutors, assistant district attorneys, and public defenders – in any court where the judge often sits, if such relationships could reasonably tend to create either an appearance of partiality or the likely need for later disqualification under Section 3E(1).

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. A recommendation, written or otherwise, should not be made if the person who is the subject of the letter is or is likely to be a litigant in a contested proceeding before the judge's court.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, by responding to official inquiries concerning a person being considered for a judgeship, and by providing letters of recommendation and testimony, whether solicited or not, for judicial nominees. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness in an adjudicatory proceeding because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness. Adjudicatory proceedings include not only proceedings before courts but also before administrative agencies, including disciplinary bodies.

(C) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation. As long as membership does not violate any other provision of this Code, nothing in this Section bars membership in any official United States military organization, in any religious organization, or in any organization that is in fact and effect an intimate, purely private organization.

Commentary

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the

organization. Whether an organization practices invidious discrimination is often a complex question to which judges must be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members that do not stigmatize any excluded persons as inferior and therefore unworthy of membership.

Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from its membership or activities on the basis of race, sex, religion, national origin, ethnicity or sexual orientation, persons who would otherwise be admitted to its membership or activities. The purpose of Section 2C is to prohibit judges from joining organizations practicing invidious discrimination, whether or not their membership practices are constitutionally protected.

Although Section 2C relates only to membership, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows or should know practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity or sexual orientation in its membership or other policies, or for the judge regularly to use such a club. Moreover, public communication by a judge approving of invidious discrimination referred to in Section 2C gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity of the judiciary, in violation of Section 2A.

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

(A) The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities

(1) A judge shall hear and decide matters assigned to the judge except those in which the judge is disqualified.

Commentary

The obligation to hear and decide all assigned matters should not be construed to preclude a judge from requesting not to be assigned to a particular case or class of cases because of strongly held personal or moral beliefs.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall maintain order and decorum in proceedings before the judge.

(4) A judge shall be patient and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of court personnel* and others.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status, and shall require* court personnel* and others not to do so.

Commentary

A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as evidencing bias or prejudice and must require the same standard of conduct of others subject to the judge's direction and control, including those who are directly involved in courtroom proceedings.

A judge must perform judicial duties impartially and fairly. A judge who manifests any bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communications, can give to parties or lawyers in the proceeding, jurors, the media, and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as biased or prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others.

Commentary

This section does not preclude legitimate advocacy when race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider any ex parte communication* concerning a pending or impending proceeding, except that:

Commentary

Section 3B(7) proscribes ex parte communications concerning a proceeding except to the limited extent permitted in Section 3B(7)(a) through (e).

Whenever the presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that the general prohibition against ex parte communications is not violated through law clerks and other court personnel.

(a) Where circumstances require, an ex parte communication* is authorized when it does not deal with substantive matters and is for scheduling or administrative purposes or emergencies provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication*, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication* and allows them an opportunity to respond.

(b) [reserved]

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:

Commentary

Section 3B(7)(c) authorizes consultation between a judge and court personnel whose job entails or includes assisting the judge in performing the judge's adjudicative responsibilities, for example clerk magistrates and their assistants, registers of probate and their assistants, and law clerks. A judge may discuss the facts of a pending or impending proceeding with such court personnel, but in view of the judge's obligation to decide a case only on the evidence presented, the judge's factual discussion may be based only on information in the case record. Accordingly, a judge may not solicit non-record factual information from court personnel about a case and must take reasonable steps to avoid receiving unsolicited non-record factual information from them. If, despite such efforts, the judge receives non-record factual information about a pending or impending case from court personnel (or indeed from any source), the judge may not base any decision in the case in whole or in part on that information unless the judge first gives the parties notice and an opportunity to respond.

Probation officers, like clerk magistrates, registers and their assistants, are court personnel who assist the judge in performing the judge's adjudicative responsibilities. However, probation officers often work independently of the judge, since one of their most significant responsibilities is the community supervision of persons sentenced to probation by the court. From their work in the community, probation officers regularly obtain or receive factual information that is not part of a case record but that may have a direct bearing on a particular party in a case. In light of this fact, Section 3B(7)(c)(ii) provides that any consultation between a judge and a probation officer about a party in a specific criminal or juvenile case take place in the presence of the parties (or their counsel) who have availed themselves of the opportunity to attend, so that there is an opportunity to hear and respond to any information being conveyed by the probation officer. However, a judge may discuss with a probation officer ex parte the specifics of various available programs as long as there is no discussion about the suitability of the program for a particular party.

Section 3B(7)(c) permits a judge to consult with other judges, subject to the limitations set forth there. This is so whether or not the judges serve on the same court. A judge may not consult about a case with an appellate judge who might be called upon to review that case on appeal. The same holds true with respect to those instances in which a judge in one department of the trial court may be called upon to review a case decided by a judge in a different department; a criminal case in which the defendant seeks a review by a judge in the Superior Court of the bail determination made by a judge in the District Court is an example. The appellate divisions of the Boston Municipal Court and of the District Court present a special situation. The judges who sit as members of these appellate divisions review on appeal cases decided by judges who serve in the same court department. However, the designation of judges to sit on the appellate divisions changes quite frequently; every judge on the

Boston Municipal Court will, and every judge on the District Court may, serve for some time as a member of that court's appellate division. In recognition of this fact, Section 3B(7)(c)(iii) does not bar judges in the same court department from consulting with each other about a case, despite the possibility that one of the judges may later review the case on appeal. However, when a judge is serving on an appellate division, the judge may not review any case that the judge has previously discussed with the judge who decided it; recusal is required. Consultation between or among judges, if otherwise permitted under Section 3B(7)(c), is appropriate only if the judge before whom the case is pending does not abrogate the responsibility personally to decide it.

(i) a judge shall take all reasonable steps to avoid receiving from court personnel* or other judges factual information concerning a case that is not part of the case record. If court personnel* or another judge nevertheless bring non-record information about a case to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond. Consultation is permitted between a judge, clerk-magistrate or other appropriate court personnel and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;

(ii) when a judge consults with a probation officer about a party in a pending or impending criminal or juvenile case, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond;

(iii) a judge shall not consult with an appellate judge, or a judge in a different trial court department, about a case that the judge being consulted might review on appeal; and

(iv) no judge shall consult with another judge about a case pending before one of them when the judge initiating the consultation knows* the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows* he or she has such an interest.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle civil matters pending before the judge.

Commentary

Section 3B(7)(d) implicitly acknowledges the public policy that favors the settlement of civil cases and the understanding that a judge can play an important role in the settlement process. In settlement discussions, a judge may, with the prior consent of all parties, meet with parties and their counsel separately. The judge must inform all parties of any such meetings, but need not disclose what was discussed.

(e) A judge may initiate, permit, or consider any ex parte communication* when authorized by law* to do so.

Commentary

Section 3B(7)(e) refers to an ex parte communication authorized by law. Examples include: the issuance of a temporary restraining order in certain circumstances, see, e.g., G. L. c. 209A, § 4 ;

Mass. R. Civ. P. 65(a); the issuance of a pre-judgment attachment or trustee process, see Mass. R. Civ. P. 4.1(f), 4.2(g); the determination of fees and expenses for indigent persons, see G. L. c 261, §§ 27A – 27 G; the issuance of temporary orders related to child custody or vacation of the marital home where conditions warrant, see G. L. c. 208, §§ 28A, 34B; and an ex parte communication authorized or required under the Rules of Professional Conduct (S.J.C. Rule 3:07).

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary

In disposing of matters promptly, efficiently, and fairly, a judge must give due regard to the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. When a judge encourages and seeks to facilitate settlement, the judge should not coerce the parties into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court personnel and litigants and their lawyers cooperate with the judge to that end.

(9) Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending proceeding in any Massachusetts court, and shall require similar abstention on the part of court personnel.

(a) This section does not apply to any oral or written statement made by a judge in the course of his or her adjudicative duties.

(b) A judge is permitted to explain for public information the procedures of the court, general legal principles, or what may be learned from the public record in a case.

(c) A judge is permitted to speak, write, or teach about cases and issues pending in appellate courts when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals and bar publications. This educational exemption does not apply, however, to comments or discussions that might interfere with a fair hearing of the case.

(d) A judge is permitted to make public comment concerning his or her conduct provided that such comments do not reasonably call into question the judge's impartiality and do not address the merits of any pending or impending judicial decision.

(e) This section does not apply to proceedings in which a judge is a litigant in a personal capacity.

Commentary

The section's restrictions on judicial speech are essential to the maintenance of the independence, impartiality, and integrity of the judiciary.

For purposes of this section, public comment is any oral or written statement about a case made by a judge other than statements made in the course of the judge's adjudicative duties. The requirement that a judge abstain from public comment regarding a pending proceeding continues during any appellate process and until final disposition. A case is impending for purposes of this section if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. This rule does not require a judge to abstain from public comment about a proceeding in a Massachusetts court that is not pending or impending.

"Any Massachusetts court" for purposes of this section means any state or federal court within the Commonwealth of Massachusetts.

Consistent with section (a), a judge may speak or write about a pending or impending case in the course of his or her adjudicative duties. A judge's oral statements from the bench during court proceedings and written orders or memoranda of decision filed in the case are made "in the course of his or her adjudicative duties." [1] Judges are encouraged to explain the basis for their decisions on the record. In some instances, such as decisions regarding bail, the use of prepared forms which become part of the public record may assist judges in this task. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings.

Section (b) permits the dissemination of public information to educate and inform the public, while assuring the public that cases are tried only in the judicial forum devoted to that purpose. A judge may explain to the media or general public the procedures of the court and general legal principles; for example, the procedures and standards governing a "dangerousness hearing" under G.L. c. 276, § 58A or restraining orders under G.L. c. 209A. A judge may also explain to the media or the general public what may be learned from the public record in a particular case. For example, a judge may respond to questions from a reporter about a judicial action that was taken and may correct an incorrect or incomplete media report by referring to matters that may be learned from the pleadings, documentary evidence, and proceedings held in open court. Section (b) permits similar responsive comments or explanations by a judge acting in accordance with administrative duties, including statements made by a judge who serves as part of a court department's judicial response team.

When speaking, writing, or teaching about cases or issues, as permitted under Section (c), a judge must take care that his or her comments do not impair public confidence in the impartiality of the judiciary.

"Conduct" as used in subsection (d) refers to the manner in which a judge behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection (d).

Speaking to a journalist is a public comment even where it is agreed that the comments are "off the record."

The authorization to comment is permissive; there is no requirement that a judge respond to statements in the media or elsewhere. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond.

[1] For guidance as to a memorandum issued by a judge that provides or supplements an earlier order (an explanatory memorandum), see Supreme Judicial Court Guidance Regarding the Issuance of Explanatory Memoranda contained in Appendix A.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case. Commendations or criticisms of verdicts may also call into question the judge's ability to rule impartially on any post-trial motions, or on remand, in the same case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law* is not available to the public. When a judge, in a judicial capacity, acquires information, including material contained in the public record that is not yet generally known*, the judge must not use the information in financial dealings for private gain. Notwithstanding the provisions of Section 3B(9), a judge shall not disclose or use, for any purpose unrelated to judicial duties, information that, although part of the public record, is not yet generally known*, if such information would be expected unnecessarily to embarrass or otherwise harm any person participating or mentioned in court proceedings.

Commentary

Information that by law is not available to the public includes but is not limited to information that is sealed by statute, court rule, or court order, all of which is absolutely non-disclosable for any purpose unrelated to judicial duties.

Among the factors to be considered in determining whether the information "contained in the public record that is not generally known" would be expected unnecessarily to embarrass or otherwise harm a person are whether there is a valid public purpose for disclosure or whether the disclosure is idle chatter or gossip.
There are other rules (for example, Section 2A), that relate to the subject matter of this rule.

(C) Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court personnel*.

(2) A judge shall require* court personnel*, including personnel who are directly involved in courtroom proceedings over which the judge presides, to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments of counsel and staff. The judge shall exercise the power of appointment only on the basis of merit, avoiding appointments based on

nepotism or personal or political favoritism. The judge shall not approve compensation of appointees beyond the fair value of service rendered.

Commentary

Appointments made by the judge include, but are not limited to, counsel, persons such as guardians ad litem and special masters, and court personnel subject to appointment by the judge. See S.J.C. Rule 1:07 regarding fee generating appointments and the maintenance of appointment dockets.

(D) Disciplinary Responsibilities

(1) A judge having knowledge* of facts indicating a substantial likelihood that another judge has committed a violation of the Code that raises a significant question about that judge's honesty, integrity, trustworthiness, or fitness for judicial office shall inform the Chief Justice of this court and of that judge's court. A judge having knowledge* of facts indicating a substantial likelihood that another judge has committed a violation of the Code that does not raise a significant question of that judge's honesty, integrity, trustworthiness, or fitness for judicial office shall take appropriate action.

(2) A judge having knowledge* of facts indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct that raises a significant question as to that lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer shall inform the Bar Counsel's office of the Board of Bar Overseers.

Commentary

This Section requires judges to report conduct indicating a substantial likelihood of a serious violation of professional conduct by judges or lawyers together with the factual basis for this conclusion. Even an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. The word "significant" in the Section refers to the seriousness of the possible offense and not the quantum of evidence of which the judge is aware.

Judges are required by this Section to participate actively in maintaining and preserving the integrity of the judicial system. The rule is necessary because judges make up a significant group that may have information about colleagues' misconduct. For this reason, judges have an opportunity and a special duty to protect the public from the consequences of serious misconduct and the potential harmful results of other violations of the Code.

The following examples are not exhaustive but include misconduct that has been found in particular factual circumstances to raise a significant question about honesty, integrity, trustworthiness, or fitness for judicial office: tampering with or attempting to influence improperly a judicial action of another judge; giving false testimony under oath; tampering with or falsifying court papers to support judicial action; grossly abusing the bail statutes; failing to recuse at a hearing when the judge is engaged in a personal financial venture with lawyers or parties; misusing appointment power to show favoritism; using court employees during regular work hours for private benefit; engaging in inappropriate political activity, such as attending fundraisers, soliciting money for candidates or causes, and lobbying except on matters concerning the law, the legal system, or the administration of justice; engaging in a pattern of any of the following activities: abuse of alcohol in public,

indifference to case law or facts, use of injudicious or abusive language on the bench, or failure to devote full time to judicial work.

Other Code violations by a judge that are less serious still require appropriate action by the judge who has knowledge of them. Examples include but are not limited to: speaking or being the guest of honor at an organization's fund-raising event; serving as a director of a family business; serving as the executor of an estate of a relative or person with whom the judge had no close familial relationship; frequently starting court business late or stopping it early; soliciting advice about pending cases from a friend who is a law professor without disclosure; placing or leaving a bumper sticker for a political candidate on a vehicle the judge regularly drives; frequently delaying making decisions in cases. Appropriate action by a judge who has knowledge of these less serious Code violations may include: speaking to the other judge directly; asking someone else who may be more appropriate to speak to that judge; reporting to the presiding judge of the court where the violation occurred or where that judge often sits; reporting to the Chief Justice of that judge's court; and speaking to Judges Concerned for Judges or calling the judicial hotline maintained by Lawyers Concerned For Lawyers, Inc. This list of actions is illustrative and not meant to be limiting.

While a measure of judgment is required in complying with this Section, a judge must report lawyer misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including knowingly making false statements of fact or law to a tribunal, suborning perjury, or engaging in misconduct that would constitute a serious crime. A serious crime is any felony, or a misdemeanor a necessary element of which includes misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit the above crimes. Section 3D(2) does not preclude a judge from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory. Reporting a violation is especially important where the victim is unlikely to discover the offense. If the lawyer is appearing before the judge, a judge may defer making a report under this Section until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge that a lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

(3) [reserved]

(E) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer;

(b) the judge served as a lawyer in the matter in controversy;

(c) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter in controversy;

(d) the judge has been, or is to the judge's knowledge* likely to be, a material witness concerning the matter in controversy;

(e) the judge has personal knowledge* of disputed evidentiary facts concerning the matter in controversy;

(f) the judge is a party to the proceeding or an officer, director, or trustee of a party or the judge knows*, or reasonably should know*, that he or she, individually or as a fiduciary*, has (i) an economic interest* in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding, (ii) a relationship interest* to a party to the proceeding where the party could be substantially affected by the outcome of the proceeding or (iii) any other more than de minimis* interest that could be substantially affected by the outcome of the proceeding;

(g) the judge knows*, or reasonably should know*, that the judge's spouse or child wherever residing, or any other member of the judge's family residing in the judge's household,* has (i) an economic interest* in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding, (ii) a relationship interest* to a party to the proceeding where the party could be substantially affected by the outcome of the proceeding or (iii) any other more than de minimis* interest that could be substantially affected by the outcome of the proceeding; or

(h) the judge's spouse or domestic partner, as well as a person within the third degree of relationship* to the judge, the judge's spouse, or the judge's domestic partner, or a spouse or domestic partner of such other person, (i) is a party to the proceeding or an officer, director, or trustee of a party, (ii) is acting as a lawyer in the proceeding, (iii) is known* by the judge to have any more than de minimis* interest that could be substantially affected by the outcome of the proceeding, or (iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

Commentary

Under this rule, a judge shall disqualify himself or herself whenever the judge's impartiality might reasonably be questioned, regardless of whether any specific rules in Sections 3E(1) (a) through (h) apply. For example, even though a judge may not be required to disqualify himself or herself because of an economic or relationship interest, the judge may be required to do so on other grounds. A more than de minimis interest, under Sections 3E(1)(f)(iii), (g)(iii), and (h)(iii) may include non-financial interests; as an example, support by the judge of an organization advocating a particular position, where the interests of the organization could be substantially affected by the outcome of the proceeding.

If the judge believes there is no real basis for disqualification, a judge may, but is not required to, disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification. See Commentary to Section 3F.

A judge is not necessarily disqualified if a lawyer in a proceeding is affiliated with a legal organization with which the spouse or a relative of the judge is affiliated.

Disqualification may be required in appropriate circumstances, including the closeness of the relationship of the relative with the judge, where the judge's impartiality might reasonably be questioned. Disqualification may also be required where the judge knows that the judge's spouse or

relative has an interest in a legal organization and that the organization could be substantially affected by the outcome of the proceeding. See Sections 3(E)(1)(g)(iii) and (h)(iii).

In determining whether an interest could raise a reasonable question as to a judge's impartiality, the judge should consider, among other factors, the dollar value of the interest and whether the interest comprises a substantial portion of the judge's total economic holdings.

In particular circumstances, a judge may need to consider carefully relationships other than those specifically mentioned in Section 3E(1) – for example, a fiancé (or fianceé) or a very close friend – to determine whether disqualification is required.

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(c). A judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and, unless remittal under Section 3F is available, appropriate, and accomplished, use reasonable efforts to transfer the matter to another judge as soon as possible.

If a judge were in the process of negotiating for employment with a law firm or other entity, the judge would be disqualified from any matters in which the law firm or other entity appeared, unless remittal under Section 3F is available, appropriate, and accomplished.

(2) [reserved]

(F) Remittal of Disqualification.

(1) A judge disqualified by the terms of Section 3E may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than for cases in which remittal is not available, the parties and lawyers, without participation of the judge, all agree that the judge should not be disqualified, the judge may participate in the proceeding. The judge shall permit an opportunity for the attorneys to consult with their clients regarding this issue. The agreement shall be incorporated in the record of the proceeding.

(2) Remittal is not available in cases in which the judge is disqualified under Sections 3E(1)(a), (b), or (d).

Commentary

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not hear comment on possible remittal unless the lawyers jointly propose remittal after consultation as provided in the Section. A party may act through counsel

if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement. There are circumstances when other provisions, such as Section 2A, may override the remittal procedure of Section 3F. An example would be where a judge's close relative has supervisory responsibility over attorneys prosecuting criminal cases in the county where the judge is sitting.

CANON 4 : A Judge Shall so Conduct the Judge's Extrajudicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.

(A) Extrajudicial Activities in General. A judge shall conduct all of the judge's extrajudicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) [reserved]

(3) interfere with the proper performance of judicial duties.

Commentary

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. The appropriateness of a judge's participation in any activity, whether law-related or not, must be assessed in light of the obligations of a judge to perform the duties of judicial office impartially and diligently. See Canon 3. Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's judicial duties, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals on the basis of their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status.

(B) Extrajudicial Activities Related to the Law, the Legal System, and the Administration of Justice. Subject to the requirements of this Code, a judge may speak, write, lecture, and teach concerning law-related matters and may participate in law-related activities.

Commentary

General Considerations: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the integrity of the legal profession and to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of civil, criminal, and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. In all circumstances, a judge must avoid conduct that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Speaking to the Public about the Administration of Justice: To further public understanding of the essential role of the judicial branch in our system of government, judges are particularly encouraged to speak to the public, including business and community groups, about issues relating to the administration of justice. A judge must avoid giving the impression that the group or its members are

in a special position to influence the judge, and where appropriate, a judge must avoid giving the impression that the judge favors the group's mission.

(C) Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law*, the legal system, or the administration of justice or except when acting pro se.

Commentary

See Section 2B regarding the obligation to avoid improper influence.

(2) A judge shall not accept appointment to any governmental position, including a governmental committee or commission, that is concerned with matters other than the improvement of the law*, the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Commentary

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice as authorized by Section 4C(3). Judges should not accept governmental appointments that are likely to interfere with their effectiveness and independence. Any permission to accept extrajudicial appointments contained in this Code is subject to applicable restrictions relating to multiple office-holding contained in the Constitution of the Commonwealth. See Part 2, Chapter 6, Article two for restrictions on justices of the Supreme Judicial Court and judges of the Probate and Family Court and Article VIII of the Amendments to the Constitution.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, fraternal, or civic organizations not conducted for profit. For example, service on the board of a public hospital or public education institution, unless it is a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational or other institution described in Section 4C(3) would generally be permitted under Section 4C(3).

(3) A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or agency devoted to the improvement of the law*, the legal system, or the administration of justice; or of any educational, religious, charitable, fraternal, or civic organization that is not conducted for profit or for the economic or political advantage of its members, subject to the following limitations and the other requirements of this Code.

Commentary

Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system, or the administration of justice; see Section 4C(2). As an

illustration of the need to be cognizant of all provisions of the Code, service by a judge on the board of an organization described in Section 4C(3) may be prohibited under Section 2C if the organization practices invidious discrimination or under Section 4A if service on the board otherwise casts doubt on the judge's capacity to act impartially as a judge.

(a) A judge:

(i) shall not contribute to, or be a member of, such an organization, except a religious organization, if it is likely that the organization will be engaged frequently in adversary proceedings in the court on which the judge serves; and

(ii) shall not serve as an officer, director, trustee, or non-legal advisor of such an organization if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in any court, state or federal, in the Commonwealth.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated as an officer, director, trustee, or non-legal advisor to determine if it is proper for the judge to continue the affiliation. For example, non-profit hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that imply commitment to causes that may come before the courts for adjudication.

A bar association is an organization "devoted to the law, the legal system, or the administration of justice" and therefore qualifies as an organization on which a judge may serve as an officer, director, trustee, or non-legal advisor. That permission, however, is qualified by the requirement in Section 4A that such service not "cast reasonable doubt on the judge's capacity to act impartially as a judge" and that it not "interfere with the proper performance of judicial duties." For example, many bar associations have become active in litigation, filing amicus briefs that take sides on a wide range of controversial issues. The more that a judge takes a leadership role or a role as spokesperson in such an organization, the more likely it is that the restrictions contained in Section 4A would prohibit assuming one of the positions mentioned in Section 4C(3). The same considerations would also hold true with respect to holding office in the other organizations mentioned in Section 4C(3).

(b) A judge as an officer, director, trustee, non-legal advisor, or member of an organization described in Section 4C(3) or in any other capacity as to such an organization:

(i) shall not participate in the management and investment of the organization's funds, shall not assist such an organization in planning fund-raising, and shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law*, the legal system, or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary

Solicitation of funds for an organization and solicitation of memberships involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge may solicit membership for or endorse or encourage membership efforts of an organization devoted to the improvement of the law, the legal system, or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism.

Use of an organization letterhead listing a judge's name for fundraising or membership solicitation violates Section 4C(3)(b). A judge must also make reasonable efforts to ensure that court personnel and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code. A fund-raising event is one where the sponsors' aim is to raise money to support the organization's activities beyond the event itself. A laudatory reference to a judge, not announced in advance, does not make the judge a "guest of honor" for purposes of this rule. (Judges should also consult the testimonial dinner law, G. L. c. 268, § 9A in relevant cases.)

(4) Subject to the requirements of this Code, a judge may serve as an officer, director, trustee, or non-legal advisor of an organization composed entirely or predominantly of judges that exists to further the educational or professional interests of judges. A judge may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but may not personally participate in the solicitation of funds, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority.

Commentary

A judge may also engage in substantial leadership and budget activities with respect to the judge-controlled organizations described in Section 4C(4), but may not engage in personal solicitation of funds except from other judges over whom the judge does not exercise supervisory or appellate authority. However, the fund-raising activities of judgecontrolled organizations must be carried out in a way that does not violate other provisions of this Code, such as Sections 2A and 2B. The names of those who contribute or decline to contribute must not be disclosed publicly or to the judges in the organization, and that policy must be disclosed to those solicited. In some circumstances, fund-raising, even if anonymous, might subsequently require recusal of a judge because of the risk of the appearance of impropriety should the fact of a substantial donation by a party or its lawyer become known.

(D) Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, that may interfere with the proper performance of the judge's judicial position, that may reasonably be perceived to exploit the judge's judicial position, or that may involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of this Code, a judge may hold and manage investments, including real estate, and receive compensation as set forth in Section 4H, but shall not serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business.

Commentary

For new judges, Section 6B postpones the time for compliance with certain provisions of this Section in some cases.

Participation by a judge in financial and business dealings is subject to the general prohibition in Section 4A against activities that tend to reflect adversely on impartiality or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1.

(3) [reserved].

(4) A judge shall manage his or her investments and other financial interests to minimize the number of cases in which disqualification is required or advisable. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household* not to accept, a gift, bequest, favor, or loan from anyone except for:

Commentary

Because a gift, bequest, favor, or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to public recognition of the judge, provided the value of the gift does not exceed the amount requiring reporting under Section 4D(5)(h) and provided the donor is not an organization whose members comprise or frequently represent the same side in litigation (or is not an individual or individuals so situated); a gift of books, tapes and other resource materials

supplied by publishers on a complimentary basis for official use; or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law*, the legal system, or the administration of justice, provided that if the value of the invitation and any food, travel, and lodging associated with the invitation exceeds the amount requiring reporting under Section 4D(5)(h), the value of the invitation and such associated items shall be reported under Section 4H.

Commentary

An exception allowed under Sections 4D(5)(a) through 4D(5)(g) is not subject to the qualification and reporting requirements of Section 4D(5)(h), but is otherwise subject to the requirements of this Code. See in particular Sections 2A, 2B and Section 4A(1).

Examples of organizations which frequently represent the same side in litigation are a bar association comprised of insurance defense attorneys or of plaintiffs' personal injury attorneys. In addition to applying to organizations, the prohibition also applies to a public recognition gift from an individual or individuals who frequently comprise or represent the same side in litigation.

The acceptance of invitations is an area of special sensitivity, and judges are reminded particularly in that context of the interrelation of all the provisions of the Code, particularly Sections 2A, 2B, and 4A(1), and the avoidance of the appearance of impropriety as well as impropriety itself. All the facts relating to the invitation must be examined by the judge, including the identity of the donor, the amount of time to be devoted to bar-related or similar activities at the event, the costs assumed by the invitor, the duration of the function, and its locale. Examples of facts that singly or in combination, could suggest conflict with Sections 2A, 2B, and 4A(1), are a function during tourist season, a lavish function, a function in a popular tourist locale, or a function distant from the Commonwealth. If there is such a conflict, the taint of impropriety or its appearance exists no matter how assiduously the judge would in fact attend to bar or similar activities at the function. The fact that a function is reported under Section 4H does not obviate the examination just described.

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other member of the judge's family residing in the judge's household*, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

Commentary

In accepting ordinary social hospitality from members of the bar, a judge should carefully weigh acceptance of the hospitality to avoid any appearance of bias.

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would require disqualification under Section 3E.

Commentary

The reference to a "close personal friend" is intended to contrast with someone who is a professional or business friend.

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds $350.00, the judge reports it in the same manner as the judge reports compensation in Section 4H. However, a gift, bequest, favor, or loan of the type set forth in Sections 4D(5)(a), 4D(5)(b), 4D(5)(f) or 4D(5)(g) that does not meet the requirements set forth there may not be accepted under the authority of this Section 4D(5)(h).

Commentary

Section 4D(5)(h) prohibits judges from accepting gifts, bequests, favors, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, bequests, favors, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge. Under the last sentence of Section 4D(5)(h), some gifts may not be accepted even if they meet the requirements of Section 4D(5)(h). For example, a gift incident to public recognition of the judge in excess of the reporting amount in Section 4D(5)(h), or a loan on terms available only to judges, may not be accepted even though the donor or lender is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; but extraordinary social hospitality, or a gift from a friend not for a special occasion, may be accepted if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge (and the judge reports the gift if the amount requires it.)

(E) Fiduciary* Activities. A judge shall not serve as an executor, administrator, trustee, guardian, or other fiduciary*, except for the estate, trust, or person of the judge's spouse, domestic partner, child, grandchild, parent, or grandparent, as well as another relative or person with whom the judge maintains a close familial relationship. As such a family fiduciary* a judge is subject to the following restrictions:

(1) The judge shall not serve if such service will interfere with the proper performance of judicial duties;

(2) The judge shall not serve if it is likely that as a fiduciary* the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) While acting as a fiduciary* a judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

Commentary

For new judges, Section 6B postpones the time for compliance with certain provisions of this Section in some cases.

Acting under a durable power of attorney or health care proxy are examples of service by the judge as an "other fiduciary" within Section 4E.

The restrictions imposed by this Section may conflict with the judge's obligation as a fiduciary. For example, a judge shall resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

(F) Arbitration and Mediation. A judge shall not act as an arbitrator or mediator in a private capacity.

(G) Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se.

Commentary

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before, or other dealings with, legislative and other governmental bodies. In acting pro se, a judge must not abuse the prestige of office to advance the interests of the judge. An illustration of such abuse would be appearing before a local zoning board in a matter relating to the judge's property and referring to the judge's judicial capacity.

(H) Compensation, Reimbursement, and Reporting

(1) Compensation and reimbursement. A judge may receive compensation and reimbursement of expenses for the extrajudicial activities not prohibited by this Code, if the source or amount of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject also to the following restrictions:

(a) Compensation shall not exceed a reasonable amount.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's guest. Any payment in excess of such an amount is compensation.

(2) Public reports. A judge shall report on or before April 15 of each year, with respect to the previous calendar year, the date, place, and nature of any activity for which the judge received compensation, the name of the payor, the amount of compensation so received, and such other information as is required by the Supreme Judicial Court or by law*. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extrajudicial compensation to the judge. The judge's report shall be filed as a public document in the office of the Administrative Assistant to the Supreme Judicial Court (G. L. c. 211, § 3A).

Commentary

> See Section 4D(5)(h) regarding reporting of gifts, bequests, favors and loans. The Code does not prohibit a judge from receiving compensation from teaching or from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge shall ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial. An illustration of the requirement that compensation not exceed what a person who is not a judge would receive for the same activity would be that a judge's compensation for teaching a law school course shall not be higher than that of other teachers merely because of the judge's status as a judge.

I. Disclosure of a judge's income, debts, investments, or other assets is required only to the extent provided in this Canon and in Sections 3E and F or as otherwise required by law*.

Commentary

> A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations are established by law and this Code. Disclosure of economic or relationship interests is required under Section 3E if a disqualification is to be overridden because of necessity and under Section 3F if remittal of disqualification is to be considered.

CANON 5 A Judge Shall Refrain from Political Activity.

(A) Political Conduct in General.

(1) A judge shall not:

(a) act as a leader of, or hold any office in, a political organization*;

(b) make speeches for a political organization* or candidate or publicly endorse a candidate for public office;

(c) solicit funds for, or pay an assessment or make a contribution to, a political organization* or candidate, attend political gatherings, or purchase tickets for political party dinners, for functions

conducted to raise money for holders of political office or for candidates for election to any political office, or for any other type of political function.

(2) A judge shall resign from the judicial position held when the judge becomes a candidate either in a primary or in a general election for elective office. On assuming a judicial position, a judge shall resign any elective public office then held.

(3) A judge may engage in activity in support or on behalf of measures to improve the law*, the legal system, or the administration of justice.

Commentary

While it is recognized that judges have the right to vote, participate as citizens in their communities, and not be isolated from the society in which they live, those rights must be viewed in light of Section 2A which requires that a judge conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A judge's participation in partisan politics may give the appearance of affecting his or her judicial actions or might actually affect the judge's judicial actions. A judge's endorsement of a candidate or appearance of an endorsement might well be viewed as judicial endorsement, and thus would advance the "private interests" of that person. Such activity would also create doubt about a judge's impartiality towards persons, organizations, or factual issues that may come before the judge.

A judge may not attend an event that is run to raise money or gather support for or opposition to a political candidate or party. The judge may not attend an event that is partisan in nature. The judge may not engage in any partisan displays of public support, such as driving an automobile with a partisan bumper sticker, posting a campaign sign outside of the judge's residence, signing nomination papers for a political candidate or a ballot issue, carrying a campaign sign, distributing campaign literature, or encouraging people to vote for or give money to a particular candidate or political party.

A judge has the right to be an informed citizen. As such, it would be permissible for a judge to attend an event that is nonpartisan, such as a forum that is open to all candidates and is intended to inform the public. Furthermore, in order to participate in an electoral primary, a judge may register as a member of a political party, but may not permit or encourage anyone to make that registration known.

A judge may not avoid the restrictions imposed by this Section by making contributions through a spouse or other family member. Political contributions by the judge's spouse must result from the independent choice of the spouse, and checks by which such contributions are made shall not include the name of the judge.

CANON 6 Compliance with this Code.

(A) Retired Judges

(1) A judge whose name has been placed upon the list of retired judges eligible to perform judicial duties, pursuant to G. L. c. 32, §§ 65E-65G, shall comply with all provisions of this Code during the term of such eligibility.

(2) A judge who has retired or resigned from judicial office shall not, for a period of six months following the date of retirement, resignation, or most recent service as a retired judge pursuant to G. L. c 32, §§ 65E-65G, perform court-connected dispute resolution services except on a pro bono publico basis, enter an appearance, or accept an appointment to represent any party in any court of the Commonwealth.

(B) Time for Compliance

A person to whom this Code becomes applicable shall comply immediately with all its provisions except Sections 4D(2), 4D(3), and 4E and shall comply with those Sections as soon as reasonably possible and in any event within one year.

Effective Date of Compliance. The effective date of compliance of this Code is October 1, 2003.

APPENDIX A : Supreme Judicial Court Guidance Regarding the Issuance of Explanatory Memoranda.

We have carefully considered whether Section 3B(9) of our Code of Judicial Conduct should apply to a memorandum issued by a judge that provides or supplements the reasons in support of an earlier order (an explanatory memorandum). We have determined that, in all but the most unusual circumstances, the decision whether to issue an explanatory memorandum is left to the sound judgment of the individual judge and is not an appropriate ground for judicial discipline under Section 3B(9). We provide guidance here to assist a judge in exercising that sound judgment.

We encourage judges to explain the basis for their decisions on the record at the time the decisions are made, including decisions concerning bail and sentencing. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings. In some instances, such as decisions regarding bail, where the volume of matters may make it difficult always to articulate detailed findings, judges should set forth their reasons on forms prepared for this purpose. When a judge orally renders a decision and intends to explain his or her reasons in a written memorandum of law, the judge should inform the parties that an explanatory memorandum will be forthcoming.

When the judge has not indicated at the time he or she issues the underlying order that a written explanatory memorandum will be forthcoming, and such a memorandum has not been requested by a party or by an appellate single justice or court, a judge should issue an explanatory memorandum only after careful consideration, weighing, at a minimum, the following factors:

• the importance of avoiding or alleviating the parties' or the public's misunderstanding or confusion by supplementing the record to reflect in more detail the reasons in support of the judge's earlier decision;

• the amount of time that has elapsed since the order was issued and the extent to which the judge's reasons for the decision remain fresh in his or her mind;

• the risk that an explanatory memorandum may unfairly affect the rights of a party or appellate review of the underlying order; and

• the danger that the issuance of an explanatory memorandum would suggest that judicial decisions are influenced by public opinion or criticism voiced by third parties, and would not promote confidence in the courts and in the independence and impartiality of judges.

An explanatory memorandum is appropriate only if issued within a reasonable time of the underlying order and if the judge clearly recalls his or her reasons for the decision. An explanatory memorandum should not be issued solely to respond to public criticism of the decision, and should not rely on any information that was not within the record before the judge at the time of the underlying order.

A judge may not issue an explanatory memorandum if the court no longer has authority to alter or amend the underlying order. By way of example, a judge may not issue an explanatory memorandum when:

• the underlying order is the subject of an interlocutory appeal, report, or other appellate proceeding that has already been docketed in the appellate court, unless such a memorandum has been requested by an appellate single justice or court;

• the case has been finally adjudicated in the trial court, no timely-filed postjudgment motions are pending, and the time within which the court may modify its orders and judgments on its own initiative has passed;

• in cases where an appeal has been taken from a final order or judgment, the appeal has been docketed in the appellate court.

3:10 Assignment of Counsel.

(Applicable to all courts.)

Section 1. Definitions. The following definitions apply in this rule:

(a) Anticipated Cost of Counsel—The cost of retaining private counsel for the defense of a felony charge within the jurisdiction of the Superior Court, as estimated and published from time to time by the Committee for Public Counsel Services.

(b) Available Funds—

(i) General Definition. A party's liquid assets and disposable net monthly income calculated after provision is made for the party's bail obligations.

(ii) Certain Assets and Income of Party's Household. A party's available funds shall include the liquid assets and disposable net monthly income of the party's spouse (or person in substantially the same relationship) and each of the party's parents, provided, in each instance, any such person lives in the same residence as the party and contributes substantially toward the

household's basic living expenses, unless that other person has an adverse interest in the proceeding (e.g., is the victim, complainant, or petitioning party, is a prospective prosecution witness, or is a party, if it is a civil matter).

(iii) Available Funds of a Party over Sixteen Supported by Another. The available funds of any party over the age of sixteen who is substantially supported by a parent or parents or by a guardian, or who continues to be claimed as a dependent for tax purposes, shall include the available funds of that person's parent or parents or guardian, except when that other person has an adverse interest in the proceeding.

(iv) Available Funds of a Party under Seventeen. The available funds of a party under the age of seventeen (including a child allegedly in need of services and an allegedly delinquent child, as defined in G.L. c. 119, §§ 21 & 52, respectively) shall include available funds of the child's parents or guardian, regardless of their place of residence, except when that other person has an adverse interest in the proceeding.

(c) Basic Living Costs—The average monthly amount spent for reasonable payments, including loan payments, toward living costs, such as shelter, food, utilities, health care, transportation, clothing, education, and support payments.

(d) Disposable Net Monthly Income—The income remaining each month after deducting income taxes, social security taxes, contributory retirement, union dues, and basic living costs.

(e) Income—Salary, wages, interest, dividends, rental income, and other earnings and cash payments, such as amounts received from pensions, annuities, social security, and public assistance programs.

(f) Indigent—A party who is:

(i) receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, or Supplemental Security Income (SSI);

(ii) receiving an annual income, after taxes, one hundred twenty-five percent or less of the then current poverty threshold referred to in G.L. c. 261, § 27A (b);

(iii) residing in a tuberculosis treatment center or a public or private mental health, mental retardation or long term care facility, including the Bridgewater State Hospital and the Treatment Center, or the subject of a proceeding in which admission or commitment to such a center or facility is sought, or who is the subject of a proceeding in which a substituted judgment determination concerning treatment is sought, provided, however, that where the judge has reason to believe that the party is not indigent, a determination of indigency shall be made in accordance with Section 4 and other applicable provisions of this rule. The provisions of paragraph (b) of Section 1 of this rule notwithstanding, for purposes of such determination

"available funds" shall not include the liquid assets or disposable net monthly income or any member of the party's family.

(iv) serving a sentence in a correctional institution and has no available funds; or

(v) held in custody in jail and has no available funds.

(g) Indigent but Able to Contribute—A party who

(i) has an annual income, after taxes, of more than one hundred twenty-five percent and less than two hundred fifty percent of the then current poverty threshold referred to in G.L. c. 261, § 27A (b), or

(ii) is charged with a felony within the jurisdiction of the Superior Court and whose available funds are insufficient to pay the anticipated cost of counsel for the defense of the felony but are sufficient to pay a portion of that cost.

(h) Liquid Assets—Cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in a motor vehicle or in other tangible property; provided that any equity in real or personal property is reasonably convertible to cash. Any motor vehicle necessary to maintain employment shall not be considered a liquid asset.

(i) Party. A defendant in a criminal proceeding, a juvenile in a delinquency proceeding, and any person, including a juvenile, in a civil matter in which the person has a right to counsel.

Section 2. Advice as to Right to Counsel.
If any party to a proceeding in which the law of the Commonwealth or the rules of this court establish a right to be represented by counsel initially appears in any court without counsel, the judge shall advise the party, or if the party is a juvenile or is under guardianship, the party and a parent or legal guardian, where appropriate, that: (a) the law requires that counsel be available in the proceeding, at public expense if necessary and (b) if the court finds that the party wants counsel and cannot afford counsel, the Committee for Public Counsel Services will provide counsel at no cost or at a reduced cost. Thereafter, the judge shall make findings as provided in the following sections of this rule.

Section 3. Waiver of Counsel.
If the party knowingly elects to proceed without counsel, a written waiver by the party and a certificate of the judge on the form hereafter provided in this section shall be signed by the party and the judge respectively, and filed with the papers in the case. If the party knowingly elects to proceed without counsel but refuses to sign the form hereafter provided, the judge shall so certify on that form, which shall be filed with the papers in the case.

In proceedings pursuant to General Laws, chapter 111, §§ 94C and 94G, chapter 123, chapter 123A, and chapter 201, prior to allowing a waiver, the judge shall specifically determine whether the party is competent to waive counsel. Notwithstanding such waiver, if the judge determines

that the party is not competent to waive counsel or is otherwise unable effectively to exercise the party's rights at a hearing, the judge shall appoint standby counsel pursuant to Section 6.

The following waiver form shall be used as provided in this Section:

Commonwealth of Massachusetts
DETERMINATION WITH RESPECT TO WAIVER OF RIGHT TO COUNSEL PURSUANT TO S.J.C. RULE 3:10

Docket Nos. _____

_____Court Department
_____Court

CASE NAME
_____
vs.
_____

I. STATEMENT OF PARTY

I, _____(Name of Party), have been informed of my right to have a lawyer represent me at every stage of the proceedings in this case, and that if I cannot afford to hire my own lawyer, this Court will assign the Committee for Public Counsel Services to provide representation for me. KNOWING THAT I HAVE A RIGHT TO HAVE A LAWYER REPRESENT ME, I NEVERTHELESS ELECT TO PROCEED IN THIS MATTER WITHOUT A LAWYER AND WAIVE MY RIGHT TO SUCH A LAWYER.

_____
Signature of Party or Parent Printed or Typed or Guardian for Incompetent/ Name of Person Juvenile Signing

Signed this _____ day of _____, 19____.

II. CERTIFICATE OF JUDGE

I,_____, hereby certify that the party named above has been informed, by me, of the right to counsel in accordance with Supreme Judicial Court Rule 3:10 and G.L. c. 211D, § 5; that the party has knowingly elected to proceed without a lawyer and
_____ has executed a waiver of counsel in my presence,
_____ has refused to sign a waiver.

_____
Signature of Judge Printed or Typed, Name of Judge, Date

Section 4. Determination of Indigency Status.

(a) If the judge finds that the party has not knowingly elected to proceed without counsel and the party does not arrange to obtain counsel, the judge shall receive a written report and opinion as to indigency from a probation officer or other appropriate court employee as provided in Section 8 of this rule. After reviewing the report and opinion and interrogating the party, as appropriate, the judge shall make one of the following three determinations:

(i) the party is indigent,

(ii) the party is indigent but able to contribute, or

(iii) the party is not indigent.

The judge shall enter findings on the following form, which shall be filed with the papers in the case:

Commonwealth of Massachusetts
JUDGE'S DETERMINATION WITH RESPECT TO INDIGENCY PURSUANT TO S.J.C. RULE 3:10

Docket Nos._____

_____Court Department
_____Court

CASE NAME
_____
vs.
_____

After considering the report and recommendation of the probation officer or other appropriate court employee, and after interrogating the party, if appropriate, based upon the standards in Supreme Judicial Court Rule 3:10, I FIND THAT THE PARTY IS:

I. ____ INDIGENT because the party:
____ receives Aid to Families with Dependent Children (AFDC).
____ receives Emergency Aid to Elderly, Disabled and Children (EAEDC).
____ receives poverty related veterans' benefits.
____ receives food stamps.
____ receives refugee resettlement benefits.
____ receives Medicaid.
____ receives Supplemental Security Income (SSI).

____ is a patient in a mental health facility or treatment center (or is the subject of a proceeding for admission to such a facility) and lacks available funds.
____ is serving a sentence in a correctional institution and has no available funds.
____ is held in custody in a jail and has no available funds.
____ has an annual income, after taxes, 125% or less of the current poverty threshold referred to in G.L. c. 261, § 27A (b).
____ is determined to be indigent pursuant to S.J.C. Rule 3:10, Section 4(b) [Judge's Section 4(b) findings on the record are appended].

II. ____ INDIGENT BUT ABLE TO CONTRIBUTE and is therefore ordered to pay $ _____ toward the cost of counsel because
the party:
____ has an annual income, after taxes, of more than 125% and less than 250% of the current poverty threshold referred to in G.L. c. 261, § 27A (b).
____ is charged with a felony within the jurisdiction of the Superior Court and has available funds sufficient to pay a portion of the
anticipated cost of counsel.
____ is determined to be indigent but able to contribute pursuant to S.J.C. Rule 3:10, Section 4(b) [Judge's Section 4(b) findings on the
record are appended].

III. ____ NOT INDIGENT and is able to pay the cost of counsel. [Judge's findings on the record are appended if this finding is pursuant to S.J.C. Rule 3:10, Section 4(b)].

_____
Signature of Judge, Date

(b) In making the determination called for by this Section, the judge shall apply the definitions of indigent and indigent but able to contribute set forth in Section 1 of this rule. Notwithstanding the determination that the application of those definitions indicates, a judge nevertheless may place a party in either of the other categories described in Section 4(a), based on a consideration of the party's available funds in relation to the party's basic living costs or based on special circumstances, or both, provided that the judge set forth in findings on the record the reason for doing so.

Section 5. Assignment of Counsel/Notice of Assignment.
If under Section 4 of this rule the judge finds that a party is in category (i) or (ii) of Section 4(a), the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate use of a different procedure that is consistent with G.L. c. 211D and the rules of this court. The court clerk or register shall promptly complete and transmit a Notice of Assignment of Counsel Form, provided by the Committee for Public Counsel Services with the approval of this court, to the party and file a copy with the papers in the case.

In proceedings pursuant to General Laws, chapter 111, §§ 94C and 94G, chapter 123, chapter 123A, and chapter 201, the judge shall appoint counsel immediately upon the filing of a petition. If, prior to the commencement of a hearing in such proceedings, the judge determines that the party is not indigent, assigned counsel may be dismissed, and, if so, the party shall be advised to retain private counsel without delay; provided, however, that if the interests of justice so require in such proceedings, the judge shall authorize the continued services of appointed counsel at public expense. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, incapable of obtaining access to funds, or incapable of locating or contracting with a lawyer. If, subsequent to the commencement of a hearing in such proceedings, the judge determines that the party is not indigent, assigned counsel shall continue to represent the party and the party may be ordered to reimburse the Commonwealth therefor.

If under Section 4 of this rule a judge has found that a party is not indigent, but after a reasonable time the party has not waived counsel, procured counsel, or seasonably petitioned the court for the appointment of counsel on the basis that, after a reasonable effort, the party has been unable to retain counsel because of financial reasons, then the case may be ordered to proceed.

Section 6. Standby Counsel.
Notwithstanding a party's waiver of counsel, the judge may assign counsel in accordance with this rule to be available to assist the party in the course of the proceedings.

Section 7. Review of Indigency Determination.

(a) A party's indigency status may be reviewed at any stage of a court proceeding if information regarding a change in financial circumstances becomes available to a probation officer or other appropriate court employee, through the court's verification system, or from some other source, including the party.

(b) A party has the right to reconsideration in a formal hearing of the findings and conclusion as to the party's entitlement to assigned counsel.

Section 8. Report by Probation Officer or Other Appropriate Court Employee.
The probation officer or other appropriate court employee shall provide to a judge a written report and opinion as to indigency on a form prescribed by this court based on information obtained from the party and subject to a verification system established by the Chief for Administration and Management of the Trial Court. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided in this rule.

Section 9. Inadmissibility of Information Obtained from a Party.
No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against the party except in a prosecution for perjury or contempt committed in providing such information.

Section 10. Counsel for Parties Indigent and Indigent but Able to Contribute.

(a) Appearance of Counsel. Counsel assigned by the Committee for Public Counsel Services to represent a party pursuant to this rule shall file an appearance in the case within forty-eight hours after notification of the assignment.

(b) Withdrawal of Appearance. If counsel assigned by the Committee for Public Counsel Services, who has filed an appearance, is unable or unwilling to represent a party, he shall move to withdraw his appearance. If the judge consents to the motion for withdrawal, the court clerk or register shall immediately notify the Committee for Public Counsel Services to make a new assignment of counsel.

(c) Payment of Counsel Costs.

(i) If a party is determined to be indigent, a party may not be ordered, required or solicited to make any payment toward the cost of counsel, except for an order entered pursuant to G.L. c. 211D, § 2A.

(ii) If a party is determined to be indigent but able to contribute, the judge shall order the party to pay a reasonable amount to the probation officer or other appropriate court employee toward the cost of counsel in addition to assessing a legal counsel fee as provided in G.L. c. 211D, § 2A. The amount ordered to be paid shall be based on the financial circumstances of the party.

(iii) All funds received as payment toward the cost of counsel, including amounts received pursuant to G.L. c. 211D, § 2A, shall be deposited with the State Treasurer in accordance with law.

3:11 Committee on Judicial Ethics.

(1) There shall be a Committee on Judicial Ethics (Committee) consisting of five persons appointed by this court, at least three of whom shall be judges or former judges. No Justice currently serving on this court shall be a member of the Committee. The members of the Committee shall serve without compensation but shall be reimbursed for necessary expenses incurred in the performance of their official duties.

When the Committee is first selected, the members shall be appointed respectively to five, four, three, two and one year terms. On the expiration of the term of office of a member, a successor shall be appointed for a term of five years. Members may be reappointed to the Committee, but no member shall be appointed to more than two successive full terms.

(2) The Committee shall render advisory opinions and may provide informal advice with respect to the interpretation of rules of court relating to the ethical and professional conduct of judges. Except for emergency opinions, the opinions of the Committee shall be in writing and shall be rendered only in response to a written request, signed by the judge requesting the opinion. The written request shall set forth fully all facts bearing on the question or questions on which the judge requests advice. The Committee shall not render opinions on hypothetical questions or on issues pending before a court, agency, or commission, including the Judicial Conduct

Commission. The Committee may decline to render an opinion for any reasons which it deems sufficient.

(3) Each written opinion shall contain a statement of the facts and a discussion of the application of the relevant rules to the facts. The Committee may publish its opinions but the name of the judge requesting the opinion and any other identifying information shall not be included in a published opinion unless the judge consents to such inclusion. If the judge did not omit or misstate any material fact in his request for an opinion, the judge may rely on a written opinion until and unless revised or revoked. This court shall not subject a judge to discipline where the conduct of the judge at issue in a proceeding was undertaken in reasonable reliance on that opinion. Informal advice provided by the Committee shall not provide the protection from discipline described in this section.

(4) This court shall designate one of the members of the Committee as Chairperson and another as Vice Chairperson. A quorum of the Committee shall consist of three members. The Committee may render written opinions only by an affirmative vote of at least three members. By rule the Committee may delegate particular types of matters, including the issuance of oral opinions on emergency matters, to a lesser number of members or to the secretary to the Committee. This court shall designate one of its employees to serve as the secretary and the principal administrative officer of the Committee.

(5) The Committee shall make rules, subject to the approval of this court, implementing this rule. In January of each year, the Committee shall submit to the court a report of its activities, together with any recommendations.

(6) Except to the extent the Committee elects to publish an opinion in the manner prescribed in paragraph (3), all requests for advice made to the committee under this rule, and all of the committee's proceedings thereon, shall be strictly confidential unless disclosure is required by court order or unless the Committee determines by majority vote of all members that disclosure is necessary to prevent or remedy a serious injury to person, property or the administration of justice. To facilitate transitions in Committee membership, the court may invite a newly appointed member whose term has not officially begun to observe Committee business for a period not to exceed three months prior to the commencement of the member's term. A member whose term has expired shall remain on the Committee pending appointment of his or her successor, and until the successor's term begins.

3:12 Code of Professional Responsibility for Clerks of the Courts.

CANON 1 Purpose and Applicability.

This Code shall be known as the "Code of Professional Responsibility for Clerks of the Courts of the Commonwealth of Massachusetts." Its purpose is to define norms of conduct and practice appropriate to persons serving in the positions covered by the Code and thereby to contribute to the preservation of public confidence in the integrity, impartiality, and independence of the courts.

The word "Clerk-Magistrate" in this Code, unless otherwise expressly provided, shall mean anyone serving in the position of Clerk-Magistrate, Clerk, Register, Recorder, Assistant Clerk-Magistrate, Assistant Clerk, Assistant Register, Deputy Recorder, Judicial Case Manager, or Assistant Judicial Case Manager in the Supreme Judicial Court, the Appeals Court, or a Department of the Trial Court of the Commonwealth, whether elected or appointed, and whether serving in a permanent or temporary capacity. The words "elected Clerk-Magistrate" shall also include a person who is appointed to complete the term of an elected Clerk-Magistrate. The word "court" in this Code shall mean the Supreme Judicial Court, the Appeals Court, a particular division of a Department of the Trial Court, or a particular Department of the Trial Court if the Department does not have divisions.

CANON 2 Compliance with Statutes and Rules of Court.

A Clerk-Magistrate shall comply with the laws of the Commonwealth, rules of court, and lawful directives of the several judicial authorities of the Commonwealth. The words "judicial authorities" in this Code, unless otherwise expressly provided, shall mean the Justices of the Supreme Judicial Court and Appeals Court, the Chief Administrative Justice of the Trial Court, the Administrative Justices of the several Departments of the Trial Court, or Associate Justices of the Trial Court, as is appropriate under the circumstances. A Clerk-Magistrate shall also comply with the lawful directives of the Court Administrator.

CANON 3 Performance of Duties.

A Clerk-Magistrate shall devote the entire time during normal court hours to the duties of his or her office, but may, according to established procedures, participate during that time in law-related educational and public service activities. An elected Clerk-Magistrate may participate during ordinary court hours in activities reasonably related to his or her duties as an elected Clerk-Magistrate. A Clerk-Magistrate shall not engage in the practice of law.

(A) Adjudicative and Administrative Responsibilities.

In the performance of adjudicative and administrative responsibilities, the following additional standards shall apply:

(1) A Clerk-Magistrate shall be faithful to the law and maintain professional competence in it as it relates to the performance of his or her duties. A Clerk-Magistrate shall not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A Clerk-Magistrate should seek to maintain order and decorum in proceedings.

(3) A Clerk-Magistrate should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others in official dealings, and should require similar conduct of those subject to his or her direction and control.

(4) A Clerk-Magistrate shall accord to every person who is legally so entitled the right to be heard in a proceeding in person or through his or her lawyer.

(5) A Clerk-Magistrate should diligently carry out his or her responsibilities and should dispose of them promptly.

(6) A Clerk-Magistrate shall facilitate public access to court records that, by law or court rule, are available to the public and shall take appropriate steps to safeguard the security and confidentiality of court records that are not open to the public.

(7) A Clerk-Magistrate may explain his or her own decisions made in the course of his or her official duties and may explain for public information the procedures of the court and the applicability of those procedures in particular circumstances. A Clerk-Magistrate should otherwise abstain from public comment about any pending or impending proceeding in any court, and should require similar abstention by subordinate court personnel.

(B) Administrative Responsibilities.

A Clerk-Magistrate should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other court officials. In so doing, a Clerk-Magistrate should be cognizant of the need to employ efficient, businesslike methods and sound practices. A Clerk-Magistrate should organize and manage the business of the Clerk-Magistrate's Office with a view to the prompt and convenient dispatch of the business of the court. A Clerk-Magistrate should supervise subordinate personnel and arrange for their training. A Clerk-Magistrate shall make personnel appointments on the basis of merit, and in compliance with applicable personnel standards.

CANON 4 Impartiality an Disqualification.

A Clerk-Magistrate shall perform the duties of Clerk-Magistrate impartially and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judicial branch of government.

(A) Appearance of Impartiality.

A Clerk-Magistrate shall not convey the impression that any person is in a special position to influence the Clerk-Magistrate, and the Clerk-Magistrate should discourage others from suggesting that they are in a position to exert such influence.

(B) Personal Affairs.

A Clerk-Magistrate shall conduct personal affairs in such a way as not to cause public disrespect for the court and the judicial system. A Clerk-Magistrate shall not engage in activities nor incur obligations which would tend to detract from the dignity of the Clerk-Magistrate's office or interfere or appear to interfere with official duty. A Clerk-Magistrate shall not engage in outside activities which would cast doubt on his or her capacity to decide impartially any issue that may come before the Clerk-Magistrate in any official capacity.

(C) Business Activities.

A Clerk-Magistrate shall not enter into any business relationship which reasonably might create a conflict with the proper performance of his or her official duty or detract from the dignity of the office. A Clerk-Magistrate shall not use the influence of the office to promote his or her business interests or those of others.

(D) Activities to Improve the Law.

A Clerk-Magistrate may use his or her title to engage in activity to improve the law, the legal system, or the administration of justice. A Clerk-Magistrate may appear at public hearings and may otherwise consult with governmental bodies or officials on such matters.

(E) Disqualification.

A Clerk-Magistrate should disqualify himself or herself from serving in an adjudicative capacity in a proceeding in which the Clerk-Magistrate's impartiality might reasonably be questioned. A Clerk-Magistrate who would be so disqualified may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If, based on such disclosure, the parties, individually or through counsel, after consultation independent of the Clerk-Magistrate, agree in writing that the Clerk-Magistrate need not be disqualified, the Clerk-Magistrate may participate in the proceeding. The agreement, signed by all parties, shall be incorporated in the record of the proceeding.

CANON 5 Outside Activities.

A Clerk-Magistrate shall regulate outside and personal activities to minimize the risk of conflict with official duties:

(A) Personal Conduct.

A Clerk-Magistrate should not engage in activities which might detract from the dignity of the office of Clerk-Magistrate or interfere with the performance of the duties of the office.

(B) Civic and Charitable Activities.

A Clerk-Magistrate may participate in civic and charitable activities that do not reflect adversely on the Clerk-Magistrate's impartiality or interfere with the performance of his or her official duties. A Clerk-Magistrate may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A Clerk-Magistrate shall not participate if there is a substantial likelihood that the organization, or a significant number of members of the organization, will be engaged in

proceedings that would ordinarily come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves.

(2) A Clerk-Magistrate may solicit funds for any educational, religious, charitable, fraternal, or civic organization, but shall not use or permit the use of the prestige of the office for that purpose or solicit his or her staff for that purpose. A Clerk-Magistrate, however, may call his or her employees' attention to a general fund raising campaign such as the Commonwealth of Massachusetts Employees Campaign. A Clerk-Magistrate may attend but, except for an elected Clerk-Magistrate, shall not be a speaker or the guest of honor at an organization's fund raising event. A Clerk-Magistrate may be listed as an officer, director, or trustee of such an organization.

(C) Financial Activities.

(1) A Clerk-Magistrate shall not conduct outside business activities in the courthouse at any time nor shall a Clerk-Magistrate conduct any outside business activities anywhere during normal court hours. A Clerk-Magistrate shall refrain from financial and business dealings that tend to reflect adversely on the Clerk-Magistrate's impartiality, interfere with the proper performance of the position of Clerk-Magistrate, or involve the Clerk-Magistrate in transactions with lawyers or other persons likely to come before the court in which the Clerk-Magistrate is serving.

(2) Subject to the limitations of subsection 5(C)(1) and subsection 4(C) of this Code, a Clerk-Magistrate may hold and manage investments, including real estate, and engage in other remunerative activity.

(D) Fiduciary Activities.

(1) A Clerk-Magistrate shall not serve as an executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his or her family, and then only if such service will not interfere with the proper performance of the Clerk-Magistrate's duties. "Member of his or her family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the Clerk-Magistrate maintains or maintained a close familial relationship. As a family fiduciary, a Clerk-Magistrate is subject to the following restrictions:

(a) A Clerk-Magistrate shall not serve in any fiduciary capacity if it is likely that as a fiduciary the Clerk-Magistrate will be engaged in proceedings that would ordinarily come before the Clerk-Magistrate in a decision-making capacity and shall resign as a fiduciary if the estate, trust, or ward becomes involved in adversary proceedings in the court in which he or she is serving.

(b) While acting as a fiduciary, a Clerk-Magistrate is subject to the same restrictions on financial activities that apply to the Clerk-Magistrate in his or her personal capacity.

(2) A Clerk-Magistrate may serve as an executor, administrator, trustee, guardian, or other fiduciary for the estate, trust, or person of one who is not a member of his or her family provided that the Clerk-Magistrate was acting in the fiduciary position prior to April 1, 1990, or that, in the case of a will designating the Clerk-Magistrate as a fiduciary, the testator or testatrix died prior to April 1, 1990. Such fiduciary activity shall not be permitted if it interferes with the

proper performance of the Clerk-Magistrate's duties and shall be subject to the provisions of subsections 5(D)(1)(a) and (b) of this Code.

(E) Appointments.

Except for activities to improve the law, the legal system, or the administration of justice, as permitted by Canon 4(D), a Clerk-Magistrate shall not accept appointment within the geographical jurisdiction of the court in which he or she serves to a governmental committee, commission or other governmental position if there is a substantial likelihood that matters involving that committee, commission or other governmental position will come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves. A Clerk-Magistrate may, however, represent the United States, the Commonwealth of Massachusetts, or a locality on ceremonial occasions or in connection with historical, educational, armed services, and cultural activities.

CANON 6 Political Activity and Elective Office.

A Clerk-Magistrate, other than an elected Clerk-Magistrate, shall refrain from political activity and, in particular, shall not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(3) solicit funds for a political organization or candidate; or

(4) hold or seek an elective public office if there is a substantial likelihood that matters involving that office will come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves. An appointed Clerk-Magistrate may become a candidate for an elected Clerk-Magistrate position. An appointed Clerk-Magistrate who holds elective office at the time of the adoption of this Code may continue to serve consecutive terms in that office.

CANON 7 Education.

A Clerk-Magistrate should seek to improve his or her own magisterial and administrative capabilities. The Clerk-Magistrate should also seek to maintain and improve the knowledge, abilities, and skills of all personnel in his or her office.

CANON 8 Non-Discrimination.

A Clerk-Magistrate shall not discriminate based on sex, race, color, creed, national origin, political affiliation, sexual orientation, age or handicap.

CANON 9 Compliance with the Code of Professional Responsibility for Clerks of the Courts.

A Clerk-Magistrate who has retired or resigned from the judicial branch shall not perform court-connected dispute resolution services except on a pro bono publico basis in any court of the Commonwealth for a period of six months following the date of retirement or resignation.

3:13 Committee on Professional Responsibility for Clerks of the Court.

The Supreme Judicial Court may establish a committee on professional responsibility to investigate any action of a Clerk-Magistrate, as defined in rule 3:12, including (a) conviction of a crime, (b) willful misconduct in office, (c) willful misconduct which, although not related to duties as a Clerk-Magistrate, brings the office of Clerk-Magistrate into disrepute, (d) conduct prejudicial to the administration of justice or conduct unbecoming a Clerk-Magistrate, whether conduct in office or outside of duties as a Clerk-Magistrate, that brings the office of Clerk-Magistrate into disrepute, or (e) any conduct that constitutes a violation of rule 3:12. The committee may receive information, investigate, and make recommendations relative to any mental or physical disability, including habitual intemperance, of a Clerk-Magistrate. The committee shall consist of at least five persons, none of whom shall be a Justice of the Supreme Judicial Court, at least one of whom shall be a currently elected Clerk-Magistrate and at least one of whom shall be an appointed Clerk-Magistrate. The composition and rules of the committee shall be as established by the Supreme Judicial Court. This rule shall not be interpreted to abrogate the authority of the Supreme Judicial Court, the Appeals Court, the Chief Administrative Justice, or an Administrative Justice of a Department of the Trial Court in any of these areas.

3:14 Advisory Committee on Ethical Opinions for Clerks of the Courts.

The Supreme Judicial Court may establish a committee to render advisory opinions with respect to the interpretation of rules of court relating to the ethical and professional conduct of Clerk-Magistrates, as defined in rule 3:12. The committee shall consist of at least five persons, none of whom shall be a Justice of the Supreme Judicial Court,at least one of whom shall be a currently elected Clerk-Magistrate and at least one of whom shall be an appointed Clerk-Magistrate. Except in emergency situations, a request for an advisory opinion must be in writing and shall be signed by the Clerk-Magistrate requesting the opinion.

The request must set forth fully all facts bearing on the question or questions on which the Clerk-Magistrate requests advice. The committee shall not render opinions on hypothetical questions, on issues pending before or under consideration by a judicial authority, unless that authority so requests, or by a court, agency, or commission. The committee may decline to render an opinion for any other reason which it deems sufficient.

Each opinion shall be in writing and shall contain a statement of the facts and a discussion of the application of the relevant rules to the facts. The committee shall publish its opinions, but the name of the Clerk-Magistrate requesting the opinion and other identifying information shall not be included in published opinions unless the concerned Clerk-Magistrate consents to such

inclusion. If a Clerk-Magistrate did not omit or misstate any material fact in the request for an opinion, the Clerk-Magistrate may rely on the written opinion until and unless revised or revoked by the committee or this court or superseded by law. The Supreme Judicial Court will not impose sanctions in any disciplinary proceeding involving an ethical violation if the Clerk-Magistrate's conduct was undertaken in reasonable reliance on an opinion issued to the Clerk-Magistrate pursuant to this provision.

3:15 Pro Hac Vice Registration Fee.

1. Each attorney not admitted to practice in this Commonwealth who seeks to be admitted pro hac vice in the Superior Court, Land Court, or any appellate court (not including the Appellate Division of the District Court or of the Boston Municipal Court) shall pay a non-refundable pro hac vice registration fee of $301 per case to the Board of Bar Overseers (Board), except when the attorney is providing pro bono publico legal assistance to an indigent client. Each attorney not admitted to practice in this Commonwealth who seeks to be admitted pro hac vice in any other court shall pay a non-refundable pro hac vice registration fee of $101 per case to the Board, except when the attorney is providing pro bono publico legal assistance to an indigent client. For purposes of this Rule, a case shall include an appeal. However, where an attorney has paid the appropriate registration fee of $301 or $101 and the case is removed, transferred, appealed or further appellate review is sought, no additional fee need be paid. Only individual attorneys, not law firms, may seek such admission.

A. Payment may be made by check, money order or online pursuant to policies established by the Board.

B. Payment will be accompanied by a form prescribed by the Board including at least the following information:

(1) The name, business address, telephone number, email address and attorney license number and states in which the attorney is licensed;

(2) The court in which the motion for pro hac vice admission is to be made, the name of the party to be represented, and the docket number if it is known; and

(3) a statement, made under the penalties of perjury, that the attorney is admitted to practice and in good standing in every jurisdiction where the attorney is admitted, and an acknowledgment that the attorney is subject to discipline by the Supreme Judicial Court and the Board.

C. Within seven days of receipt of a pro hac vice registration fee the Board will send an acknowledgment to the attorney seeking admission.

D. An attorney who is exempt from paying a registration fee because the attorney will provide pro bono publico legal assistance to an indigent client must complete and submit to the Board the form required by paragraph B, along with a statement that the attorney will be providing services pro bono publico to an indigent client.

2. Motions to a court for admission pro hac vice shall be made by a member of the bar of the Commonwealth of Massachusetts and must aver that the registration fee required by Rule 3:15 has been paid or include, as an attachment, a copy of the Board acknowledgment. An attorney who is exempt from paying a registration fee because the attorney will provide pro bono publico legal assistance to an indigent client must aver that the attorney will provide such assistance.

3. The Board may retain a portion of each pro hac vice registration fee to cover its costs in administering the fee and will pay the balance to the IOLTA Committee on a quarterly basis. The IOLTA Committee shall disburse the fees in the same manner as other IOLTA funds are disbursed in accordance with Rule 1.15(g)(4) and (5) of Rule 3:07, Massachusetts Rules of Professional Conduct.

3:16 Practicing with Professionalism Course for New Lawyers.

1. Practicing with Professionalism Course Requirement. All persons who are admitted to the bar of the Commonwealth, whether admitted after passing the law examination pursuant to S.J.C. Rule 3:01, Section 5, or by motion pursuant to Section 6, shall, by no later than eighteen months after admission to the Massachusetts bar, complete a one-day, in-person, mandatory Practicing with Professionalism Course approved by the Supreme Judicial Court or its designee. The course shall be presented as needed to accommodate the number of lawyers admitted in Massachusetts annually.

2. Course Offering. The course shall be offered by one or more continuing legal education providers, bar associations, law schools, other educational institutions, or other providers approved by the Supreme Judicial Court or its designee. The course curriculum shall be subject to standards issued by the Supreme Judicial Court or its designee.

3. Proof of Compliance. The course provider(s) shall submit documentation of course completion to the Massachusetts Board of Bar Overseers and the attendees in accordance with procedures established by the Supreme Judicial Court or its designee.

4. Failure to Comply. Any attorney who fails to complete the course described in Section 1 within eighteen months after admission to practice in Massachusetts shall receive a written notice of noncompliance from the Board of Bar Overseers, sent by e-mail or first-class mail to the e-mail or home address furnished by the attorney on the last registration statement filed as required by S.J.C. Rule 4:02. If the attorney fails to complete the course described in Section 1 within ninety days from the date of the mailing of the notice, the Board of Bar Overseers shall file a petition for the attorney's suspension with the Clerk of this court for Suffolk County.

5. Suspension. Any attorney suspended under the provisions of Section 4 above shall become subject to the provisions of Rule 4:01, Section 17(4), upon entry of the suspension order, and if not reinstated within thirty days after entry shall become subject to the other provisions of said Section 17.

6. Reinstatement. Any attorney otherwise in good standing who is suspended for failure to complete the course described in Section 1 may be reinstated to practice in Massachusetts by

filing with the court and serving upon the Board of Bar Overseers (a) documentation of course completion; (b) an affidavit on a form provided by the Board of Bar Overseers showing that the attorney has fully complied with the requirements of the suspension order and with the applicable provisions of Rule 4:01, Section 17, has registered pursuant to Rule 4:02, and paid all arrears in bar registration fees due from the date of the last payment to the date of his or her request for reinstatement, including any late assessments required under Rule 4:03; and (c) paid the Board of Bar Overseers an assessment of $100.

7. Fees. Fees for the course shall be approved by the Supreme Judicial Court.

8. Annual Evaluation. Each approved provider shall report annually to the Supreme Judicial Court or its designee. The report shall include the agenda, faculty, fee, attendance, curriculum, and course evaluation. The Board of Bar Overseers shall report annually the number of attorneys suspended for noncompliance.

9. Application. This Rule 3:16 shall apply to all attorneys admitted to the Massachusetts bar on or after the effective date of the rule.

CHAPTER FOUR : BAR DISCIPLINE AND CLIENTS' SECURITY PROTECTION

4:01 Bar Discipline.

Section 1. Jurisdiction.

(1) Any lawyer or foreign legal consultant admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction and the provisions of this rule as amended from time to time.

(2) Any Information, report, or other pleading filed in the Supreme Judicial Court pursuant to this rule shall be filed with the clerk of this court for Suffolk County. It shall be presented to the chief justice, who shall designate a justice to hear the matter.

Section 2. Venue of Disciplinary Hearings.

Unless the Board Chair or the Chair's designee specifies a different venue, a hearing on a petition for discipline shall take place at the offices of the Board. The Board Chair or the Chair's designee shall consider the convenience of the complainant, witnesses, the respondent and hearing committee in selecting a hearing location.

Section 3. Grounds for Discipline.

(1) Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court. A violation of this Chapter 4 by a lawyer, including without limitation the failure without

good cause (a) to comply with a subpoena validly issued under section 22 of this rule; (b) to respond to requests for information by the Bar Counsel or the Board made in the course of the processing of a complaint; (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (see section 4 of this rule); or (d) to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program shall constitute misconduct and shall be grounds for appropriate discipline.

(2) Failure to comply with (a) or (b) of subsection (1) or failure to file an answer as required by section 8(3) of this rule or to appear at a hearing before a hearing committee, special hearing officer, or panel of the Board shall result in the entry of an order of administrative suspension upon the bar counsel's filing with this court of a petition for administrative suspension which sets forth the violation of this section and an affidavit of the bar counsel affirming that the lawyer was served with the request for information, the subpoena, the petition for discipline, or the notice of hearing in accordance with the provisions of section 21 of this rule; that the lawyer was afforded a reasonable period of time for compliance with the request for information or the subpoena, or to answer the petition, or with reasonable notice of the hearing and had failed to comply, to answer, or to appear; and that the request for information, subpoena, petition, or notice of hearing was accompanied by a statement advising the respondent-lawyer that failure to comply with the request for information or subpoena, or to answer timely the petition, or to appear at the hearing would result in administrative suspension without further hearing.

(3) Any suspension under the provisions of subsection (2) above shall be effective forthwith upon entry of the suspension order and shall be subject to the provisions of section 17(4) of this rule. If not reinstated within thirty days after entry, the lawyer shall become subject to the other provisions of section 17 of this rule. As a condition precedent to reinstatement, such lawyer shall file with the Board and with the bar counsel an affidavit stating the extent to which he or she has complied with subsection (1) of this section and with the applicable provisions of section 17 of this rule. The lawyer shall also as a condition of reinstatement pay all expenses incurred by the Office of Bar Counsel and the Board in obtaining compliance with this section and in seeking suspension, including an administrative fee of twenty-five dollars.

Section 4. Types of Discipline.

Discipline of lawyers may be (a) by disbarment, resignation pursuant to section 15 of this rule, or suspension by this court; (b) by public reprimand by the Board; or (c) by admonition by the bar counsel.

Section 5. The Board of Bar Overseers.

(1) This court shall appoint a Board of Bar Overseers (Board) to act, as provided in this Chapter Four, with respect to the conduct and discipline of lawyers and in such matters as may be referred to the Board by any court or by any judge or justice. The Board shall consist of such number of members as the court may determine from time to time. The court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. The Massachusetts Bar Association and each county bar association (including, for the purposes of

this section, the Boston Bar Association as the bar association for Suffolk County) may submit to this court in writing the names of two nominees for each vacancy in the Board. Any lawyer may submit in writing the names of nominees. The court may, but need not, make appointments to the Board from the nominees so submitted and, in making appointments, shall give appropriate consideration to a reasonable geographical distribution of appointees among disciplinary districts. The court shall from time to time designate one member of the Board as Chair and another as Vice Chair. The Vice Chair shall perform the duties of the Chair in the Chair's absence or incapacity to act.

(2) Appointments to the Board shall be for a term of four years. No member shall be appointed to more than two consecutive full terms but (a) a member appointed for less than a full term (originally or to fill a vacancy) may serve two full terms in addition to such part of a full term, and (b) a former member shall again be eligible for appointment after a lapse of one or more years. A member whose term has expired shall continue in office until a successor is appointed and, in any event, shall continue to serve on any hearing or appeal panel to which he or she has been appointed until the panel completes its duties and may be recalled to serve on the panel in the event of a remand by the Board or the court.

(3) The Board of Bar Overseers

(a) may consider and investigate the conduct of any lawyer within this court's jurisdiction either on its own motion or upon complaint by any person;

(b) shall appoint a chief Bar Counsel (the Bar Counsel) who shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required, all to serve at the pleasure of the court, the appointment of the Bar Counsel to be with the approval of the court; and may employ and compensate such other persons as may be required or appropriate in the performance of the Board's duties;

(c) shall appoint one or more hearing committees, each committee to consist of three or more individuals, to perform such functions as may be assigned by the Board with reference to charges of misconduct; provided, however, that each hearing committee shall be chaired by a lawyer and no hearing committee shall consist of more than one nonlawyer;

(d) may appoint a special hearing officer, who shall be a lawyer, to hear charges of misconduct when, in view of the anticipated length of the hearing or for other reasons, the Board determines that a speedy and just disposition would be better accomplished by such appointment than by referring the matter to a hearing committee or panel of the Board;

(e) may, through its Chair, refer charges to an appropriate hearing committee, to a special hearing officer, or to a hearing panel of the Board;

(f) shall review, and may revise, the findings of fact, conclusions of law, and recommendations of hearing committees, special hearing officers, or hearing panels. The Board in its discretion may refer an appeal taken pursuant to section 8(5) of this rule to a panel of its own members for its recommendation;

(g) may issue a public reprimand to lawyers for misconduct, and in any case where disbarment or suspension of a lawyer is to be sought or recommended, or where the Bar Counsel or the Respondent-lawyer appeals pursuant to section 8(6) of this rule, shall file an Information with this court;

(h) with the approval of this court, may adopt and publish rules of procedure and other regulations not inconsistent with this rule;

(i) may lease office space and make contracts and arrangements for the performance of administrative and similar services required or appropriate in the performance of the Board's duties;

(j) may, but need not, consult with local bar associations in the several counties and their officers concerning any appointments which it is herein authorized to make;

(k) may invest or direct the investment of the fees or any portion thereof, paid pursuant to Rule 4:03, section (1), and may cause funds to be deposited in any bank, banking institution, savings bank, or federally insured savings and loan association in this Commonwealth provided, however, that the Board shall have no obligation to cause these fees or any portion thereof to be invested; and

(l) may perform other acts necessary or proper in the performance of the Board's duties.

(4) For any action requiring a vote of the Board, the Board shall act only with the concurrence of a majority of the Board who are present and voting, provided, however, that a quorum shall be present. A quorum shall consist of a majority of the Board, including members who are recused or abstain.

Section 6. Hearing Committees.

(1) Hearing committee members shall be appointed for a term of three years, and no member shall serve for more than two successive three-year terms. A member whose term has expired shall continue in office until a successor is appointed, and, in any event, shall continue to serve on any committee to which he or she has been appointed until the committee completes its duties and may be recalled to serve on the committee in the event of a remand by the Board or the court. A former member may be again appointed after the expiration of one year from his or her last service.

(2) The Board shall designate one member of each committee, who shall be a lawyer, to serve as chair. The committee shall act only with a concurrence of a majority of its members who are present, provided, however, that two members shall constitute a quorum.

(3) Hearing committees

(a) shall conduct hearings on formal charges of misconduct upon reference by the Board or its chair, and

(b) may recommend that the matter be concluded by dismissal, admonition, public reprimand, suspension, or disbarment.

(4) If a special hearing officer is appointed to hear disciplinary charges, that officer shall perform all the duties imposed upon a hearing committee by this rule or by the rules of the Board. Unless otherwise provided herein, the words "hearing committee" used throughout this rule shall also mean a special hearing officer or hearing panel.

Section 7. The Bar Counsel.

The Bar Counsel

(1) shall investigate all matters involving alleged misconduct by a lawyer coming to his or her attention from any source, except matters involving alleged misconduct by the Bar Counsel, assistant Bar Counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition, provided that Bar Counsel need not entertain any allegation that Bar Counsel in his or her discretion determines to be frivolous, to fall outside the Board's jurisdiction, or to involve conduct that does not warrant further action;

(2) shall dispose of all matters involving alleged misconduct by a lawyer in accordance with this rule and any rules and regulations issued by the Board for his or her guidance which may provide

(a) that Bar Counsel need not pursue or may close a complaint whenever the matter complained of is frivolous, falls outside the jurisdiction of the Board, or involves allegations of misconduct that do not warrant further action,

(b) for adjustment of complaints found by the Bar Counsel to be of a minor character by informal conference, admonition, or by diversion to an alternative educational, remedial, or rehabilitative program, and

(c) for disposition by recommending to the Board the institution of formal proceedings in which the Bar Counsel seeks public discipline, but, except as to a complaint that is closed by Bar Counsel or that Bar Counsel determines need not be pursued, no disposition shall be recommended or undertaken by the Bar Counsel until the accused lawyer shall have been afforded opportunity to state his or her position with respect to the allegations against him or her;

(3) shall prosecute all disciplinary proceedings before hearing committees, special hearing officers, the Board, and this court;

(4) shall appear, with full rights to participate as a party, at hearings conducted with respect to petitions for reinstatement by suspended or disbarred lawyers, lawyers who have resigned, or lawyers on disability inactive status;

(5) shall maintain permanent records of all matters presented to him or her and the disposition thereof, except that (a) the Board may provide by rule for the expunction of the records of a complaint against a lawyer which has been docketed solely on account of a report made by a financial institution that has dishonored an instrument presented against a lawyer's trust account when the instrument was dishonored solely due to the error of the financial institution, and (b) the Bar Counsel shall destroy and expunge the records of a complaint against a lawyer which has been closed and not subsequently reopened within six years of the date of closing unless a complaint has been filed in the intervening six-year period. In the event a complaint is so filed or reopened, the records shall not be destroyed and expunged until the expiration of six years from the date on which all complaints have been closed and not reopened and all complaints have been dismissed and not reopened;

(6) shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required; and

(7) may delegate any duties or functions to a duly appointed assistant acting under his or her general supervision.

Section 8. Procedure.

(1) Investigation. In accordance with any rules and regulations of the Board, investigations (whether upon complaint or otherwise) shall be conducted by the Bar Counsel, except as otherwise provided by section 7(1) of this rule. Following completion of any investigation, or of a determination pursuant to section 7(1) that an investigation is not warranted, the Bar Counsel shall take further action, which may include, among others,

(a) closing or declining to pursue a complaint and informing the complainant in writing of the reasons for not investigating a complaint or for closing the file and of the complainant's right to request review by a member of the Board;

(b) closing a matter after adjustment, informal conference, or diversion to an alternative educational, remedial, or rehabilitative program;

(c) recommending to the Board that

(i) an admonition of the lawyer be administered;

(ii) formal proceedings be instituted; or

(iii) public discipline be imposed by agreement.

Except in the case of a recommendation that public discipline be imposed by agreement, a designated Board member may approve, reject, or modify the recommended action, but the Bar Counsel may appeal to the Board Chair from any modification or rejection of a recommendation that an admonition be administered, or that formal proceedings be instituted. The Board Chair

may approve or modify the recommended action. A recommendation that formal discipline be imposed by agreement shall be submitted directly to the full Board.

(2) Admonition.

(a) On appeal by Bar Counsel pursuant to subsection (1), the decision of the Board Chair to approve, modify, or reject the recommendation of an admonition shall be final.

(b) If an admonition is approved by either the designated Board member or the Board Chair on appeal, the Bar Counsel shall make service of the admonition on the Respondent-lawyer together with a summary of the basis for the admonition. Bar Counsel shall also provide written notice to the Respondent-lawyer of the right to demand in writing within fourteen days of the date of service that the admonition be vacated and a hearing provided; the requirement that the Respondent-lawyer submit with the demand a written statement of objections to the factual allegations and disciplinary violations set forth in the summary and all matters in mitigation; that failure of the Respondent-lawyer to demand within fourteen days after service that the admonition be vacated and to submit a statement of objections constitutes consent to the admonition; and that failure to set forth matters in mitigation constitutes a waiver of the right to present evidence in mitigation at the hearing.

(c) In the event of a demand that the admonition be vacated, the matter shall be disposed of in accordance with the procedure set forth in section 8(4) for expedited hearings.

(d) Eight years after the administration of an admonition, it shall be vacated, and the complaint which gave rise to it dismissed, unless during such period another complaint has resulted in the imposition of discipline or is then pending.

(3) Formal Proceedings.

(a) As to matters for which formal proceedings have been approved pursuant to section 8(1) of this rule, disciplinary proceedings shall be instituted by the Bar Counsel's filing a petition for discipline with the Board setting forth specific charges of alleged misconduct. A copy of the petition shall be served, together with a notice from the Board, setting a time for answer which shall not be less than twenty days after such service upon the Respondent-lawyer and advising the Respondent-lawyer that the failure to file an answer shall be grounds for administrative suspension pursuant to section 3(2) of this rule. The Respondent-lawyer shall file his or her answer with the Board and serve a copy thereof on the Bar Counsel. In the event the Respondent-lawyer fails to file a timely answer to the petition, the charges shall be deemed admitted. Averments in the petition are admitted when not denied in the answer.

(b) The matter shall be assigned to a hearing committee, to a special hearing officer, or to the Board or a panel of the Board, and the Board shall give notice to the Bar Counsel, and to the Respondent-lawyer's counsel, if any, and, if not, to the Respondent-lawyer of the date and place set for hearing. The notice of hearing shall be served at least fifteen days in advance thereof. The notice shall advise the Respondent-lawyer that the failure to appear for hearing will be grounds for administrative suspension pursuant to section 3(2) of this rule.

(c) In the event the Respondent-lawyer files an answer admitting the charges and does not request the opportunity to be heard in mitigation, the Bar Counsel and the Respondent-lawyer may jointly recommend to the Board that the Respondent-lawyer receive a public reprimand or a suspension. If the Board accepts a joint recommendation for a public reprimand, it shall issue such reprimand. If the Board accepts a joint recommendation for suspension, the Board shall file with the clerk of this court for Suffolk County an Information, together with the record of its proceedings. If the parties do not make such a joint recommendation, or if the Board rejects such recommendation, the matter shall be assigned to an appropriate hearing committee, to a special hearing officer, or to the Board or a panel of the Board, for hearing. A tie vote of the Board on such a recommendation shall constitute a rejection of the recommendation.

(d) The hearing committee, special hearing officer, or panel of the Board shall file promptly with the Board a written report containing its findings of fact, conclusions of law, and recommendations, together with a record of the proceedings before it.

(4) Expedited Hearing.

(a) When the Respondent-lawyer has requested a hearing within fourteen days of service of an admonition in accordance with the requirements of section 8(2) of this rule, Bar Counsel shall file the admonition summary with the Board, along with the Respondent-lawyer's demand for hearing and statement of objections and matters in mitigation, if any, and the matter shall be assigned to a special hearing officer. After hearing, the special hearing officer shall file with the Board a report containing his or her written findings of fact and conclusions of law, and shall recommend that: (1) the Respondent-lawyer receive an admonition, (2) the charges be dismissed, or (3) the matter warrants a more substantial sanction than admonition and should be remanded for formal proceedings in accordance with section 8(3) of this rule.

(b) Respondent-lawyer and Bar Counsel shall have the right to seek review by the Board of the decision by the special hearing officer in accordance with the procedure set forth in subsection (5)(a) of this rule, but any such review shall be on the briefs only and there shall be no oral argument. In the event the Board determines that the matter shall be remanded for formal proceedings, it shall assign the matter to a hearing committee or special hearing officer other than the one who heard the case initially. The Board's decision shall otherwise be final and there shall be no right by either Bar Counsel or the Respondent-lawyer to demand after conclusion of an expedited hearing that an Information be filed.

(5) Review by the Board.

(a) Upon receipt of a hearing committee's, special hearing officer's, or hearing panel's report after formal proceedings, if there is objection by the Respondent-lawyer or by the Bar Counsel to the findings and recommendations, the Board shall set dates for submission of briefs and for any further hearing which the Board in its discretion deems necessary. The Board shall review, and may revise, the findings of fact, conclusions of law and recommendation of the hearing committee, special hearing officer, or hearing panel, paying due respect to the role of the hearing

committee, the special hearing officer, or the panel as the sole judge of the credibility of the testimony presented at the hearing.

(b) In the event that the Board determines that the proceedings should be dismissed, it shall so notify the Respondent-lawyer.

(c) In the event that the Board determines that the proceedings should be concluded by admonition or public reprimand, it shall so notify the Respondent-lawyer.

(6) Review by the Supreme Judicial Court. The Board shall file an Information whenever it shall determine that formal proceedings should be concluded by suspension or disbarment; or whenever either the Bar Counsel or the Respondent-lawyer objects to having formal proceedings concluded by dismissal, admonition or by public reprimand, by filing a written demand with the Board for the filing of an Information within twenty days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The subsidiary facts found by the Board and contained in its report filed with the Information shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(7) Disbarment by Consent. A lawyer accused of professional misconduct who does not wish to contest the charges may waive the foregoing provisions of this section and consent to the entry of a judgment of disbarment. Upon satisfying itself that the lawyer has given such consent freely and voluntarily, with full awareness of the implications of consenting to disbarment, and has acknowledged under oath that the material facts upon which the charges are based are true or can be proved by a preponderance of the evidence, the court may enter a judgment disbarring the lawyer from the practice of law.

Section 9. Immunity.

(1) Complaints submitted to the Board or to the bar counsel shall be confidential and absolutely privileged. The complainant shall be immune from civil liability based upon his or her complaint; provided, however, that such immunity from suit shall apply only to communications to the Board or the bar counsel and shall not apply to public disclosure of information contained in or relating to the complaint.

(2) The complainant and each witness giving sworn testimony or otherwise communicating with the Board or the bar counsel during the course of any investigation or proceedings under this rule shall be immune from civil liability based on any such testimony or communications; provided, however, that such immunity from suit shall apply only to testimony given or communications made to the Board or the bar counsel and shall not apply to public disclosure of information attested to or communicated during the course of the investigation or proceedings.

(3) The Board, members of the Board and its staff, members of hearing committees, special hearing officers, and the bar counsel and members of his or her staff shall be immune from liability for any conduct in the course of their official duties.

Section 10. Refusal of Complainant to Proceed; Compromise; or Restitution.

Abatement of an investigation into the conduct of a lawyer or other related proceedings shall not be required by the unwillingness or neglect of the complainant to cooperate in the investigation, or by any settlement, compromise or restitution. A lawyer shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.

Section 11. Matters Involving Related Pending Civil, Criminal, or Administrative Proceedings.

The investigation or prosecution of complaints involving material allegations which are substantially similar to the material allegations of pending criminal, civil, administrative, or bar disciplinary proceedings in this or another jurisdiction shall not be deferred unless the Board or a single member designated by the Chair, in its discretion, or the court, for good cause shown, shall authorize such deferment, as to which either the court or the Board may impose conditions. The acquittal of the Respondent-lawyer on criminal charges, or a verdict, judgment, or ruling in the lawyer's favor in civil, administrative, or bar disciplinary proceedings shall not require abatement of a disciplinary investigation predicated upon the same or substantially similar material allegations.

Section 12. Lawyers Convicted of Crimes.

(1) The term "conviction" shall include any guilty verdict or finding of guilt and any admission to or finding of sufficient facts and any plea of guilty or nolo contendere which has been accepted by the court, whether or not sentence has been imposed.

(2) A conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.

(3) The term "serious crime" shall include (a) any felony, and (b) any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit a "serious crime."

(4) Upon the filing with this court of a certificate establishing a lawyer's conviction of a serious crime, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law, regardless of the pendency of an appeal, pending final disposition of any disciplinary proceeding commenced upon such conviction. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. The court shall also refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. A disciplinary proceeding so instituted need not be brought to hearing until all appeals from the conviction are concluded.

(5) Upon receipt of a notice of a conviction of a lawyer for a crime not constituting a serious crime, this court may refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. This court need make no reference with respect to convictions for minor offenses.

(6) A lawyer suspended under the provisions of subsection (4) above will be reinstated immediately upon the filing of a certificate that the underlying conviction for a serious crime has been reversed or set aside, but the reinstatement need not terminate any formal proceedings then pending against the lawyer.

(7) The clerk of any court within the Commonwealth in which a lawyer is convicted shall transmit a certificate thereof to this court and to the Board within ten days of said conviction.

(8) Within ten days of a lawyer's conviction of a crime, as defined in subsection 12(1) of this rule, the lawyer shall notify the bar counsel of the conviction.

(9) Upon being advised that a lawyer has been convicted of (a) a crime within this Commonwealth and that no certificate has been filed under subsection (7) above, or (b) a crime in another jurisdiction, the bar counsel shall obtain a certificate of the conviction and transmit it or a copy to the court and to the Board.

Section 12A. Lawyer Constituting Threat of Harm to Clients.

Upon the filing with this court of a petition by the bar counsel alleging facts showing that a lawyer poses a threat of substantial harm to clients or prospective clients, or that the lawyer's whereabouts are unknown, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law pending final disposition of any disciplinary proceeding commenced by the bar counsel. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. In the interest of justice, the court, upon application of the lawyer, may terminate such suspension at any time after affording the bar counsel an opportunity to be heard.

Section 13. Disability Inactive Status.

(1) Involuntary Commitment, Adjudication of Incompetence, or Transfer to Disability Inactive Status. Where a lawyer has been judicially declared incompetent or committed to a mental hospital after a judicial hearing, or where a lawyer has been placed by court order under guardianship or conservatorship, or where a lawyer has been transferred to disability inactive status in another jurisdiction, the court, upon proper proof of the fact, shall enter an order transferring the lawyer to disability inactive status. A copy of such order shall be served, in the manner the court may direct, upon the lawyer, his or her guardian or conservator, and the director of the institution to which the lawyer is committed.

(2) Investigation of Incapacity. The bar counsel shall investigate information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law, except information involving the physical or mental condition of the bar counsel, assistant bar counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition. In the event that the lawyer admits that he or she is incapacitated, the court may, upon petition of the bar counsel, enter an order placing the lawyer on disability inactive status, accepting the lawyer's resignation, or temporarily suspending the lawyer from the practice of law. With the approval of the Board chair or a member of the Board designated by the chair, the bar counsel may initiate formal proceedings pursuant to subsection (4) of this section to determine whether the lawyer shall be transferred to disability inactive status.

(3) Inability to Assist in Defense. If during the course of a disciplinary investigation or proceeding under this rule the respondent-lawyer alleges an inability to assist in the defense due to mental or physical incapacity, the court, upon petition by the bar counsel or the respondent-lawyer, shall immediately transfer the respondent-lawyer to disability inactive status until further order of the court. If the bar counsel contests the respondent-lawyer's allegation, then a determination shall be made concerning the incapacity pursuant to subsection (4) of this section.

(4) Proceedings to Determine Incapacity.

(a) Proceedings to adjudicate contested allegations of disability or incapacity shall be held before a hearing committee, special hearing officer, or a panel of the Board and shall be commenced upon petition by the bar counsel. The proceedings shall be conducted in the same manner as disciplinary hearings and shall be open to the public as provided in section 20.

(b) The court, Board, hearing committee, special hearing officer, or hearing panel may require the examination of the respondent-lawyer by qualified medical experts designated by them.

(c) The court or the Board may appoint a lawyer to represent the respondent-lawyer if the lawyer is without adequate representation.

(d) The hearing committee, special hearing officer, or panel of the Board shall report promptly to the Board its findings and recommendations, together with a record of the proceedings before it. The lawyer and the bar counsel shall have the rights of appeal provided for in section 8 of this rule. The Board shall file an Information with the clerk of this court for Suffolk County together with its recommendation and the record of the proceedings before it.

(e) If, after hearing and upon due consideration of the record including the recommendation of the Board as provided in subsection (6) of section 8 of this rule, the court concludes that the respondent is incapacitated from continuing to practice law, it shall enter an order transferring the respondent to disability inactive status until further order of the court.

(f) Disciplinary proceedings shall not be stayed unless the court finds that the respondent-lawyer is so incapacitated by reason of mental or physical infirmity that he or she is incapable of assisting in his or her defense as provided in subsection (3) of this section. If the court determines the respondent-lawyer's claim of incapacity to defend to be invalid, the disciplinary

investigation or proceedings shall resume, and the court shall immediately temporarily suspend the respondent-lawyer from the practice of law pending final disposition of the matter. The court may direct that the expense of the independent examinations be paid by the lawyer.

(5) Public Notice of Transfer to Disability Inactive Status. The Board shall cause a notice of transfer to disability inactive status to be published in the same manner as a disciplinary sanction imposed under section 8 of this rule is published.

(6) Reinstatement from Disability Inactive Status.

(a) Reinstatements from disability inactive status shall be subject to the provisions of section 18 of this rule except as herein provided.

(b) A lawyer shall be entitled to petition for transfer to active status from disability inactive status once a year or at such intervals as this court may direct in the order transferring the respondent to disability inactive status or any modifications thereof.

(c) The Board, upon referral from the court, may direct an examination of the lawyer by qualified medical experts designated by the Board.

(d) Where a lawyer placed on disability inactive status under subsection (1) of this section has been judicially declared to be competent or returned to active status by the other jurisdiction, this court, after hearing, may dispense with referring the matter to the Board pursuant to subsection (5) of section 18 for the taking of further evidence that his or her disability has been removed and may immediately direct the lawyer's reinstatement to active status upon such terms as are deemed proper and advisable.

(e) A lawyer seeking reinstatement under this section shall have the burden of demonstrating that his or her physical or mental condition does not adversely affect the lawyer's ability to practice law and that he or she has the competency and learning in law required for admission to practice.

(7) Waiver of Privilege. A lawyer who files for reinstatement pursuant to the provisions of subsection (6) of this section or who alleges incapacity to defend himself or herself in a disciplinary investigation or proceedings pursuant to the provisions of subsection (3) shall be required to disclose the name of each medical provider, hospital, or other institution by whom or in which the lawyer has been examined or treated since the time of transfer to disability inactive status or during the period of the alleged incapacity. The lawyer shall furnish to this court and to the bar counsel written consent to the release of information and records relating to the disability upon request by the court or Board, court- or Board-appointed medical experts, or the bar counsel.

Section 14. Appointment of Commissioner to Protect Clients' Interests When Lawyer Disappears or Dies, or Is Placed on Disability Inactive Status.

(1) Whenever a lawyer is placed on disability inactive status, or disappears or dies, and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known

to exist, this court, after giving the bar counsel an opportunity to be heard and upon proper proof of the fact, may appoint a lawyer or lawyers as commissioner to make an inventory of the files of the inactive, disappearing, or deceased lawyer and to take appropriate action to protect the interests of clients of the inactive, disappearing, or deceased lawyer, as well as such lawyer's interest.

(2) The commissioner so appointed shall not disclose any information contained in any files listed in such inventory without the consent of the client to whom such file relates except as necessary to carry out the order of this court to make such inventory. The commissioner shall be reimbursed for reasonable expenses and may be awarded fair compensation. The commissioner's expenses and fees shall be paid by the lawyer unless otherwise ordered by the court.

Section 15. Resignations by Lawyers under Disciplinary Investigation.

(1) A lawyer who is the subject of an investigation under this Chapter Four may submit a resignation by delivering to the Board an affidavit stating that he or she desires to resign, and that:

(a) the resignation is freely and voluntarily rendered; the lawyer is not being subjected to coercion or duress and is fully aware of the implications of submitting the resignation;

(b) the lawyer is aware that there is currently pending an investigation into allegations that he or she has been guilty of misconduct, the nature of which shall be specifically set forth; and

(c) the lawyer acknowledges that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proved by a preponderance of the evidence.

(d) the lawyer waives the right to hearing as provided by this rule.

(2) Upon receipt of the required affidavit, the Board shall file it, together with its recommendation thereon, with this court which may enter an order.

(3) All proceedings under this section shall be public as provided in section 20 of this rule.

(4) Any lawyer whose resignation under this section has been accepted must comply with the provisions of section 17 of this rule regarding notice.

Section 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been suspended or disbarred from the practice of law in another jurisdiction (including any federal court and any state or federal administrative body or tribunal) or has resigned during the pendency of a disciplinary investigation or proceeding, this court shall issue a notice directed to the respondent-lawyer containing: (a) a copy of the order from the other jurisdiction; and (b) an order directing that the respondent-lawyer inform the court within thirty days from service of the notice of any claim that the imposition of the identical or other

discipline in this Commonwealth would be unwarranted and the reasons therefor. The bar counsel shall cause this notice to be served on the respondent-lawyer in accordance with this rule.

(2) In the event that the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in the Commonwealth may (but need not) be deferred.

(3) Upon the expiration of thirty days from service of the notice under subsection (1) above, the court, after hearing, may enter such order as the facts brought to its attention may justify. The judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct. The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth.

(4) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been subjected to public discipline other than suspension or disbarment in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), the Board and the clerk of this court for Suffolk County shall file it and make it available to the public to the extent that the record of any other public disciplinary proceeding would be made available.

(5) A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or an admission in connection with a resignation in another jurisdiction may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth.

(6) A lawyer subject to public or private discipline in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), or whose right to practice law has otherwise been curtailed or limited in such other jurisdiction, shall provide certified copies of the order imposing such discipline or other disposition to the Board and to the bar counsel within ten days of the issuance of such order.

(7) A lawyer admitted to practice in this Commonwealth who is denied admission to the bar of another jurisdiction (including any federal court and any state or federal administrative body or tribunal), for reasons other than failure to pass the bar examination, shall provide certified copies of any such decision, notice or order to the Board and the bar counsel within ten days of its issuance.

Section 17. Action by Attorneys after Disbarment, Suspension, Resignation or Transfer to Disability Inactive Status.

(1) In every case where a lawyer has been disbarred, suspended, temporarily suspended, or placed on disability inactive status, or where a lawyer has resigned pursuant to the provisions of

section 15 of this rule, the lawyer shall, within fourteen days of the date of entry of the disbarment, suspension, temporary suspension, transfer to disability inactive status, or resignation, take the following actions:

(a) file a notice of withdrawal as of the effective date thereof with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs (c) and (d) of this subsection, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

(b) resign as of the effective date thereof all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs (c) and (d) of this subsection, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

(c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has resigned or that the lawyer has been disbarred, suspended, temporarily suspended, or transferred to disability inactive status; that he or she is disqualified from acting as a lawyer after the effective date thereof; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has resigned, been disbarred, suspended, or transferred to disability inactive status and, as a consequence, is disqualified from acting as a lawyer after the effective date thereof;

(e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

(f) refund any part of any fees paid in advance that have not been earned;

(g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his or her possession, custody or control.

(h) give such other notice of the court's action as the court may direct in the public interest.

Unless otherwise ordered by the court, all notices required by this section shall be served by certified mail, return receipt requested, in a form approved by the Board.

(2) Whenever the court deems it necessary, it may appoint a commissioner to take appropriate action in lieu of, or in addition to, the action directed in subsection (1) of this section. The appointment of the commissioner shall be at the expense of the lawyer unless otherwise ordered by the court.

(3) Orders imposing temporary suspension shall be immediate and forthwith, and orders imposing disbarment or suspension or accepting the resignation of the lawyer or placing a lawyer on disability inactive status shall be effective thirty days after entry, unless otherwise ordered by the court. After entry of such order, the lawyer shall not accept any new retainer or engage as lawyer for another in any new case or matter of any nature. During the period between the entry date of the order and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) The Board shall promptly transmit a copy of the order of temporary suspension, suspension, disbarment, resignation, or transfer to disability inactive status to the clerk of each court in the Commonwealth, state or federal, in which it has reason to believe the disciplined lawyer has been engaged in practice.

(5) Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of the order and with bar disciplinary rules. Appended to the affidavit of compliance shall be

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court.

(b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of the order any client, trust or fiduciary funds;

(c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of the order or thereafter;

(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

(e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;

(f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice provisions of this rule.

(6) Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the clerk of this court for Suffolk County:

(a) a copy of the affidavit of compliance required by subsection 5, above.

(b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;

(c) the residence or other street address where communications to the lawyer may thereafter be directed.

(7) Except as provided in section 18(3) of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status.

(8) Any lawyer who is disbarred, suspended for a definite or an indefinite period, or who has resigned and who is found by the court to have violated the provisions of this rule by engaging in legal or unauthorized paralegal work prior to reinstatement under this rule may not be reinstated until after the expiration of a specified term determined by the court after a finding that the lawyer has violated the provisions of this rule. A lawyer on disability inactive status who knowingly violates the provisions of this rule by engaging in legal or paralegal work shall be removed from disability inactive status and temporarily suspended pending the outcome of the disciplinary investigation and proceedings.

Section 18. Reinstatement.

(1) Eligibility for Reinstatement – Short-term suspensions.

(a) A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has paid any required fees and costs, and (iii) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(b) A lawyer who has been suspended for more than six months but not more than one year pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has taken the Multi-State Professional Responsibility Examination during the period of suspension and received a passing grade as established by the Board of Bar Examiners, (iii) has paid any required fees and costs, and (iv) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(c) Reinstatement under this subsection (1) will be effective automatically ten days after the filing of the affidavit unless the Bar Counsel, prior to the expiration of the ten-day period, files a

notice of objections with the court. In such instances, the court shall hold a hearing to determine if the filing of a petition for reinstatement and a reinstatement hearing as provided elsewhere in this section 18 shall be required.

(d) The right to automatic reinstatement under this subsection (1) shall not apply to any lawyer who fails to file the required affidavit within six months after the original term of suspension has expired. In such a case the lawyer must file a petition for reinstatement under paragraph (2) of this section.

(2) Eligibility for Reinstatement – Disbarment, Resignation, and Long-term Suspensions.

(a) Except as the court by order may direct, a lawyer who has been disbarred, or whose resignation has been allowed under section 15 of this rule, may not petition for reinstatement until three months prior to the expiration of at least eight years from the effective date of the order of disbarment or allowance of resignation.

(b) Except as the court by order may direct, a lawyer who has been suspended for an indefinite period may not petition for reinstatement until the expiration of at least three months prior to five years from the effective date of the order of suspension.

(c) Except as the court by order may direct, a lawyer who has been suspended for a specific period of more than one year may not petition for reinstatement until three months prior to the expiration of the period specified in the order of suspension.

(3) Employment as Paralegal.

At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in employment as a paralegal. When the term of suspension or disbarment or resignation has been extended pursuant to the provisions of section 17(8) of this rule, the lawyer may not petition to be employed as a paralegal until the expiration of the extended term. The court may allow such motion subject to whatever conditions it deems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.

(4) Petitions for Reinstatement.

Petitions for reinstatement required under this section 18 and those required under section 13 of this rule shall be filed with the clerk of this court for Suffolk County and

(a) shall state whether the petitioner has complied with all the terms and conditions of the order imposing suspension or disbarment, accepting a resignation, or placing the petitioner on disability inactive status, as the case may be;

(b) shall state whether the petitioner has paid any costs assessed by the court under section 23 of this rule;

(c) shall state the extent to which the petitioner has made restitution to, or otherwise made whole, all clients or others injured by the petitioner's misconduct;

(d) shall state whether the petitioner has repaid the Clients' Security Board any funds awarded on account of the petitioner's misconduct;

(e) shall state that the petitioner has taken the Multi-State Professional Responsibility Examination after entry of the order of suspension, disbarment, or acceptance of resignation, and has received a passing grade as established by the Board of Bar Examiners;

(f) shall state that the petitioner has posted with the Board any bond it has required under paragraph 6 of this section 18; and

(g) shall state that the petitioner has filed with the Board and served upon the Bar Counsel copies of the petition and the completed questionnaire required by the Board under its rules.

(5) Procedure on Petitions for Reinstatement.

The clerk shall transmit a copy of the petition for reinstatement to the Board within three days after filing. Except with the written consent of the Board or the Bar Counsel, no hearing upon the merits of such a petition shall be held prior to the expiration of the full term of suspension, indefinite suspension, disbarment, or resignation pursuant to section 15 of this rule and in no event earlier than sixty days after transmittal of the petition to the Board or such further time as the court may allow to permit reasonable consideration of the petition by the Board. Upon receipt of such a petition the Board may hear the petition itself or may refer it to an appropriate hearing committee, to a special hearing officer, or to a panel of the Board designated by the Chair. On any petition the Board, the hearing committee, special hearing officer, or panel shall promptly hear the petitioner who shall have the burden of demonstrating that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. On any petition referred, the hearing committee, special hearing officer, or panel shall transmit to the Board its findings and recommendations, together with any record. The Board shall file the Board's recommendations and findings with the court, together with any record. The subsidiary facts found by the Board shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(6) Costs and Expenses.

The court in its discretion may direct that the petitioning lawyer pay all necessary expenses incurred in connection with a petition for reinstatement, and the Board may require the posting of a reasonable bond to cover such expenses before acting on any petition assigned for hearing under this section 18.

(7) Waiver of Hearing.

The court may, on motion of the Bar Counsel, assented to by the Board and the petitioner, waive hearing under this section and allow the petition for reinstatement.

(8) Further Petitions for Reinstatement.

Except as the court by order may direct, no lawyer shall be permitted to reapply for reinstatement or readmission within one year following the final disposition of an adverse judgment upon a petition for reinstatement or readmission.

Section 19. Expenses.

The salary of the bar counsel, the bar counsel's expenses, the expenses of the Board, hearing committees, and special hearing officers, and other expenses incurred in the administration of this rule, may be paid by the Board out of the funds collected under the provisions of Rule 4:03, or, where the court deems that appropriate, from state funds as the court may order. The Board shall annually obtain an independent audit by a certified public accountant of the funds entrusted to it and their disposition, and shall file a copy of such audit with this court.

Section 20. Confidentiality and Public Proceedings.

(1) Except as the court shall otherwise order or as otherwise provided in this rule, the Board and the bar counsel shall keep confidential all information to this court involving allegations of misconduct by a lawyer and all information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law until the occurrence of one of the following events:

(a) Submission of a resignation pursuant to section 15 of this rule.

(b) Submission of a recommendation that formal discipline be imposed by agreement

(c) Service upon the respondent-lawyer of a petition for discipline instituting formal charges against the lawyer or of a petition seeking to place the lawyer on disability inactive status.

This section shall not prevent the members of the Board or the bar counsel from disclosing such information as they deem necessary to carry out their duties under this rule.

(2) Notwithstanding subsection (1) of this section, the bar counsel or the Board may disclose the pendency, subject matter, and status of an investigation if:

(a) the respondent-lawyer has formally waived confidentiality or made the matter public;

(b) the investigation is predicated upon a conviction of the respondent-lawyer for a serious crime as defined in section 12 herein;

(c) the investigation is based upon allegations that have become generally known to the public; or

(d) there is a need to notify another person or organization in order to protect the public, the administration of justice, or the legal profession.

(3) Upon the submission of an affidavit of resignation pursuant to section 15 of this rule or upon the submission of a stipulation between the bar counsel and the respondent-lawyer which recommends public discipline or after the service upon the respondent-lawyer of a petition for discipline instituting formal disciplinary charges or of a petition seeking to place the lawyer on disability inactive status, the proceedings are open to the public except for:

(a) deliberations of the hearing committee, the special hearing officer, the hearing panel, the appeal panel, the Board, or this court;

(b) information with respect to which the Board has issued a protective order under subsection (4) hereof;

(c) information with respect to which this court has issued a protective order on appeal from a Board decision denying such order under subsection (4) hereof; or

(d) further proceedings following the recommendation by a hearing committee, a special hearing officer, a hearing panel, or an appeal panel, or following an order of the Board or this court, that an admonition be imposed or that a petition for discipline be dismissed. In such event, the record shall be sealed and the proceedings shall be closed until and unless the Board or this court orders otherwise.

(4) In order to protect the interests of a complainant, witness, third party, or respondent-lawyer, the Board may, upon application of the bar counsel or any affected person and for good cause shown, issue a protective order prohibiting the public disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the respondent-lawyer on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. The bar counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the clerk of this court for Suffolk County within seven days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The pendency of such an appeal shall not be grounds to stay proceedings before a hearing committee, a special hearing officer, or any panel of the Board.

(5) The provisions of this section shall not be construed to prohibit the Board from notifying a complainant concerning the Board's disposition of the complaint and the reasons therefor, or to deny access to relevant information to the Clients' Security Board, or to authorized agencies

investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or considering reciprocal disciplinary action, or to law enforcement agencies investigating qualifications for government employment where discipline under this Chapter Four has been imposed, or, except as the court may direct, where the proceedings are pending and the Board in its discretion believes disclosure is warranted. In addition, the clerk of this court for Suffolk County shall transmit notice of all public discipline imposed by this court to the National Discipline Data Bank maintained by the American Bar Association.

(6) When an investigation by the bar counsel or the Board concerns allegations of a serious crime as defined in section 12 herein, or disciplinary charges in another jurisdiction, the bar counsel or the Board may disclose information not otherwise public under this rule to the appropriate agency responsible for criminal or disciplinary enforcement and exchange such information with such agency during the course of its investigation of the same lawyer. When requested by an appropriate disciplinary agency investigating disciplinary charges in another jurisdiction, the bar counsel or the Board may also disclose the existence of any prior discipline.

Section 21. Service.

Any notice or pleading required to be served under this Chapter Four may be served upon the respondent-lawyer in hand or by addressing it by certified, registered or first class mail to the address furnished in the last registration statement filed by the respondent-lawyer in accordance with Rule 4:02. Service by mail is complete upon mailing.

Section 22. Subpoena Power.

(1) Upon request by the bar counsel or a respondent-lawyer for testimony or the production of evidence at a hearing, or upon request by the bar counsel for testimony or the production of evidence at any stage of an investigation, witnesses may be summoned by subpoenas issued at the direction of a Board member, the chair of a hearing committee, or a special hearing officer. Witnesses shall be examined under oath or affirmation. Testimony may be taken by a hearing committee, a special hearing officer, or a hearing panel outside the Commonwealth if the ends of justice so require. Where appropriate, testimony may be taken within or without the Commonwealth by deposition or by Commission. So far as practicable a stenographic, electronic, or videotape record shall be made and preserved for a reasonable time.

(2) Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of a subpoena has been duly approved under the law of the other jurisdiction, a member of the Board may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

Section 23. Costs.

The court, in its discretion, may direct that a respondent-lawyer pay the costs incurred in connection with the processing of a disciplinary proceeding and information, as well as the costs

incurred by the bar counsel and the Board in attempting to gain information from the respondent-lawyer in connection with the processing of a complaint against said lawyer.

Section 24. Restitution.

The court or the Board, in its discretion, may order a respondent-lawyer to make restitution to those persons financially injured by his or her conduct and to reimburse the Clients' Security Fund for any payments made on account of misappropriation.

4:02 Periodic Registration of Attorneys.

(1) Registration Statement Required. Every attorney admitted to, or engaging in, the practice of law in this Commonwealth, within three months of becoming subject to this chapter and annually thereafter, shall file with the Board a registration statement setting forth his or her current residence and office addresses, and a business email address, and such other information as this court may from time to time direct, including the date of his or her admission to the bar of this court and of each admission to practice in each other jurisdiction, including each Federal court and each administrative body. The statement shall disclose whether the attorney is in good standing in each such jurisdiction, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. The Board may adopt rules and regulations establishing a system of staggered annual registrations, and in order to implement such a system may provide for a transition period during which different attorneys may be required to file registration statements at different times and with different expiration dates, so that thereafter all annual registrations will not expire on the same date. In addition to such registration statement, every attorney shall file a supplemental statement of any change in the information previously submitted, including residential address, office address, and business email address, within fourteen days of such change. Within twenty days of the receipt of a registration statement or supplement thereto filed by an attorney, the Board shall acknowledge receipt thereof in order to enable the attorney on request to demonstrate compliance with the requirement of this rule.

(1A) Foreign Legal Consultants. Every person licensed to practice in this Commonwealth as a foreign legal consultant pursuant to Rule 3:05, within three months of becoming subject to this chapter and annually thereafter, shall file with the Board a registration statement setting forth his or her current residence and office addresses, and a business email address, and such other information as this court may from time to time direct, including the date of his or her license to practice as a foreign legal consultant and of each admission to practice in each other jurisdiction including each foreign court. The original statement and each annual statement shall provide a document establishing that the foreign legal consultant is in good standing in each such jurisdiction, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. In addition to such registration statement, every foreign legal consultant shall file a supplemental statement of any change in the information previously submitted, including residential address, office address, and business email address, within fourteen days of such change. Foreign legal consultants shall be subject to the provisions of Rule 4:03 and subsections (2), (3), (4), and (5) of this Rule.

(2) Designation of IOLTA Account. Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, specify the name, account number and depository of his or her IOLTA account. The Board shall transmit information regarding attorneys' IOLTA accounts to the Supreme Judicial Court and to the IOLTA Committee established by the court.

(2A) Professional Liability Insurance Disclosure.

(a) Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, certify whether he or she is currently covered by professional liability insurance. Each attorney currently registered as active in the practice of law in this Commonwealth who reports being covered by professional liability insurance shall notify the Board in writing within thirty days if the insurance policy providing coverage lapses or terminates for any reason without immediate renewal or replacement with substitute coverage.

(b) The foregoing shall be certified by each attorney in such form as may be prescribed by the Board. The information submitted pursuant to this subsection will be made available to the public by such means as may be designated by the Board.

(c) Any attorney who fails to comply with this subsection may, upon petition filed by the bar counsel or the Board, be suspended from the practice of law until such time as the attorney complies. Supplying false information or failure to notify the Board of lapse or termination of insurance coverage as required by this subsection shall subject the attorney to appropriate disciplinary action.

(3) Failure to File. Any attorney who fails to file the statement or any supplement thereto in accordance with the requirements of subsections (1), (1A), (2), and (2A) above shall be subject to suspension in accordance with the procedures set forth in Rule 4:03.

(4) Inactive Status.

(a) Any attorney may advise the Board in writing that he or she desires to assume inactive status and to discontinue the practice of law in this Commonwealth. Upon the filing of such notice, the attorney shall continue to file annual registration statements for as long as he or she remains on inactive status, but shall no longer be eligible to practice law in this Commonwealth, except to provide pro bono publico legal services in accordance with Rule 4:02(8)(a). Any inactive attorney shall pay the fee imposed pursuant to Rule 4:03 for inactive attorneys.

(b) Upon the filing of a notice that he or she wishes to assume inactive status, an attorney shall be removed from the rolls of those classified as active until and unless he or she requests reinstatement to the active rolls and pays for the year of reinstatement the fee imposed pursuant to Rule 4:03 for active attorneys.

(5) Retirement.

(a) An attorney may advise the Board in writing that he or she desires to retire from the bar and to discontinue the practice of law in this Commonwealth. Upon the filing of such notice, the attorney shall no longer be eligible to practice law in this Commonwealth but shall continue to file registration statements for three years thereafter in order that he or she can be located in the event complaints are made about his or her conduct while he or she was engaged in practice in this Commonwealth. A retired attorney may provide pro bono publico legal services in accordance with Rule 4:02(8)(b). A retired attorney providing such services shall file annual registration statements as provided in that Rule. Any retired attorney will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b) Upon the filing of a notice that he or she wishes to retire from the bar, an attorney shall be removed from the rolls of those classified as active until and unless he or she requests reinstatement to the active rolls and pays the fee imposed pursuant to Rule 4:03 for active attorneys for each of the years during which he or she was retired from the bar.

(6) Judicial Status.

(a) Any attorney who sits as a judge of any state or Federal court may advise the Board in writing that he or she is a sitting judge and desires to discontinue the practice of law in this Commonwealth. Upon the filing of such a notice, the attorney will be placed on judicial status and will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b) Upon the filing of a notice that he or she has left the bench and wishes to be reinstated to the active rolls and upon payment for the year of reinstatement of the fee imposed pursuant to Rule 4:03 for active attorneys, an attorney on judicial status shall be so reinstated.

(7) Clerk Status.

(a) Any "clerk-magistrate," as defined in Canon 1 of Supreme Judicial Court Rule 3:12, and any Federal clerk of court, chief deputy clerk and deputy clerk may advise the Board in writing that he or she is a clerk. Upon the filing of such a notice, the attorney will be placed on clerk status and will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b) Upon the filing of a notice that he or she is no longer a clerk and wishes to be reinstated to the active rolls and upon payment for the year of reinstatement of the fee imposed pursuant to Rule 4:03 for active attorneys, an attorney on clerk status shall be so reinstated.

(8) Pro Bono Status.

(a) Any attorney admitted to the practice of law in the Commonwealth who has assumed inactive status in accordance with Rule 4:02(4) but who wishes to provide pro bono publico legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) may advise the Board by filing an appropriate annual registration statement that he or she will limit his or her legal practice to providing pro bono publico legal services under the auspices of an approved legal services organization, as defined below. The annual registration statement shall indicate whether the

attorney is, or was at the time he or she assumed inactive status, the subject of any pending grievance or disciplinary charge and shall be signed by an authorized representative of the approved legal services organization under whose auspices the attorney will provide services. Unless the Board of Bar Overseers objects, the attorney may begin providing pro bono services after filing such a statement.

(b) Any attorney admitted to the practice of law in the Commonwealth who has retired from the bar and discontinued the practice of law in this Commonwealth in accordance with Rule 4:02(5) may advise the Board by filing an appropriate annual registration statement that he or she will limit his or her legal practice to providing pro bono publico legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) under the auspices of an approved legal services organization, as defined below. The annual registration statement shall indicate whether the attorney is, or was at the time he or she retired, the subject of any pending grievance or disciplinary charge and shall be signed by an authorized representative of an approved legal services organization under whose auspices the attorney will provide services. Unless the Board of Bar Overseers objects, the attorney may begin providing pro bono services after filing such a statement.

(c) For purposes of this Rule, an approved legal services organization shall include a pro bono publico legal services program sponsored by a court-annexed program, a bar association, a Massachusetts law school, or a not-for-profit organization that provides legal services to persons of limited means and that receives funding from the federal Legal Services Corporation, the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation, the Boston Bar Foundation, or the Women's Bar Foundation, and in addition, shall include any not-for-profit legal services organization designated as an approved legal services organization after petition to the Supreme Judicial Court.

(9) In-House Counsel Status.

(a) Any attorney who is admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, and who wishes to engage in the practice of law as in-house counsel in the Commonwealth of Massachusetts shall advise the Board by (i) filing an appropriate annual registration statement that he or she will limit legal practice in Massachusetts to engaging in the practice of law as in-house counsel, and (ii) identifying the organization on whose behalf the legal services are provided. The initial annual registration statement shall be accompanied by a certificate of good standing from each jurisdiction in which the attorney is licensed to practice law. The initial annual registration statement and all later annual registration statements shall disclose whether the attorney is in good standing in each jurisdiction to which he or she is admitted, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. The initial annual registration statement and all later annual registration statements shall be signed by an authorized representative of the organization on whose behalf the attorney seeks to engage in the practice of law as in-house counsel. Unless the Board of Bar Overseers objects, after filing such initial statement the attorney may engage in the practice of law as in-house counsel in the Commonwealth of Massachusetts as described in the filing under this Rule.

(b) As used in this section 9, "to engage in the practice of law as in-house Counsel" means to provide on behalf of a single organization (including a governmental entity) or its organizational affiliates any legal services that constitute the practice of law. Notwithstanding this limitation, such in-house counsel may provide pro bono public legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) under the auspices of either (1) an approved legal services organization (as defined in paragraph (8)(c) above) or (2) a lawyer admitted to practice and in good standing in the Commonwealth of Massachusetts.

(c) Any attorney registered under this section who changes or terminates his or her employment shall be required to file a supplemental statement of change in information under Rule 4:02(1) regardless of whether he or she wishes to continue to engage in the practice of law in the Commonwealth of Massachusetts as in-house counsel for another organization.

(d) Nothing in this section shall be deemed to affect any definition, limitation or explanation under rule, by decision, or otherwise, of what constitutes engaging in the practice of law in this Commonwealth, as used in section 4:02(1).

(e) Nothing in this section permits an attorney registered under this section to provide services for which the forum requires pro hac vice admission.

(f) As used in this section, "organization" does not include a corporation, partnership, limited liability company or other entity that itself engages in the practice of law by providing legal services to others.

(10) Residential Address Confidential. Residential addresses disclosed on registration statements, except those designated as the registrant's place of business, shall be treated as confidential and shall be used by the Board and by Bar Counsel only for the purpose of communicating with the registrants or otherwise in the course of the business of the Board or Bar Counsel. Other than in the course of such business, neither the Board nor Bar Counsel shall disclose any such residential address to any third party unless directed to do so by order of this Court for Suffolk County.

(11) Use by courts of attorneys' business physical and electronic mailing addresses. On a regular basis, the courts will access the data base of the board to obtain attorneys' business physical and electronic mailing addresses. The courts may use the attorneys' business physical and electronic mailing addresses for the courts' business purposes.

4:03 Periodic Assessment of Attorneys.

(1)(a) Every attorney required to register in accordance with Rule 4:02, other than a retired attorney, sitting judge, clerk-magistrate as defined in Canon 1 of Supreme Judicial Court Rule 3:12, Federal clerk of court, chief deputy clerk and deputy clerk, or suspended attorney, shall pay an annual fee as established by the court from time to time, which shall be paid to the Board with the registration statement required under Rule 4:02. The fee so paid subject to any applicable

orders of this court shall be used to defray the costs of attorney registration and disciplinary enforcement, to provide funds for the operation of the Clients' Security Board and Fund established under Rule 4:04, to provide funds for the operation of the Massachusetts lawyers assistance programs provided by Lawyers Concerned for Lawyers, Inc. (LCL), and for such other purposes as the Board, with the approval of the court, from time to time shall determine.

(b) The registration statement required under Rule 4:02 shall provide for a voluntary annual fee of $51, or such amount as established by the court from time to time, for use in the administration of justice and provision of civil legal services to those who cannot afford them. The registration statement shall further provide that any attorney who does not wish to pay the voluntary fee under this subsection shall so indicate and shall not be required to make the payment. An attorney's decision as to whether to pay this voluntary fee shall be confidential.

(c) The Board shall remit, at least quarterly, to the IOLTA Committee the fees collected under subsection (b), which shall disburse the fees in the same manner as other IOLTA funds are disbursed in accordance with Rule 1.15(g)(4) and (5) of Rule 3:07, Supreme Judicial Court Rules of Professional Conduct. The Massachusetts Legal Assistance Corporation and other designated charitable entities receiving these funds shall describe their distribution of these funds for use in the administration of justice and provision of civil legal services to those who cannot afford them in the annual report required under Rule 1.15(g)(6) of Rule 3:07.

(2) To any attorney who, without permission from the Board, fails to pay the fee required under subsection (1) above within thirty days, the Board shall mail a letter by first-class mail to the addresses furnished on the last registration statement filed as required by Rule 4:02, notifying the attorney of his or her failure to pay the required fee and that, if within fifteen days from the date of the mailing of the letter the attorney shall fail to pay the fee, there shall be added to the fee a late assessment of fifty dollars. If within forty-five days from the date of the mailing of the letter, he or she shall fail to pay the fee, the Board shall mail a certified or registered letter to the last known business address and a letter by first-class mail to the last known residential address, notifying the attorney of his or her failure to pay, and shall file a petition for the attorney's suspension with the Clerk of this court for Suffolk County.

(3) Any attorney suspended under the provisions of subsection (2) above shall become subject to the provisions of Rule 4:01, Section 17 (4), upon entry of the suspension order, and if not reinstated within thirty days after entry shall become subject to the other provisions of said Section 17. As a condition precedent to reinstatement, such attorney shall file with the Board an affidavit stating the extent to which he or she has complied with applicable provisions of Rule 4:01, Section 17, and shall pay all arrears due from the date of the last payment to the date of his or her request for reinstatement, including the late assessment of fifty dollars required under subsection (2) above, and shall also pay to the Board a penalty of one hundred dollars.

4:04 Clients' Security Board and Fund.

Section 1. A Clients' Security Board (Board) shall be appointed by the full court. This Board shall consist of seven members of the Massachusetts bar to serve as public trustees to receive, hold, manage, and distribute the funds allocated to the Board from the annual fees assessed under

subsection (1) of Rule 4:03. Such funds shall be held by the Board in trust and known as the Clients' Security Fund (Fund). The purpose of the Fund is to discharge, as far as practicable and in a reasonable manner, the collective professional responsibility of the members of the Massachusetts bar with respect to losses caused to the public by defalcations of members of the bar, acting either as attorneys or as fiduciaries (except to the extent to which they are bonded, or to the extent such losses are otherwise covered).

Section 2.

(1) The Massachusetts Bar Association, each county bar association (including the Boston Bar Association as the county bar association for Suffolk County) and other appropriate organizations may submit to the court not more than three nominees for each vacancy on the Board. The full court shall select from these nominees or from any other members of the bar a person to fill each vacancy, and shall designate a Chairman, and a Vice Chairman to act in the absence for any cause of the Chairman.

(2) When the Board is first selected, one member shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. When the sixth and seventh members of the Board are first selected, one member shall be appointed for a term of four years and one for a term of five years. All terms (except to fill an unexpired term) thereafter shall be for five years and no member shall succeed himself after two consecutive full terms, in addition to any term of less than five years, either by original appointment or to complete an unexpired term. He shall be eligible, however, for reappointment for further terms after a lapse of one or more years. A member whose term has expired shall continue in office until a successor is appointed.

Section 3. Meetings of the Board shall be held at the call of the Chairman or a majority of the members, and shall be held at least once each year, upon reasonable notice. Four members shall constitute a quorum. A majority of the members present at a duly constituted meeting may exercise any powers held by the Board.

Section 4. The Board, members of the Board, and the staff of the Board shall be immune from liability for any conduct in the course of their official duties.

4:05 Claims by Clients for Reimbursement of Losses.

Section 1. The Board may consider applications by clients for reimbursement of losses discovered after the effective date of these rules, and may honor, pay, or reject such claims in whole or in part to the extent that funds are available and in accordance with such rules, regulations and principles as may be in force from time to time, especially the provisions of this Chapter Four. All reimbursements shall be a matter of grace, not right, and no client, beneficiary, employer, organization, or other person shall have any right or interest in the Fund.

Section 2. No application for reimbursement from the Fund shall be allowed unless the attorney of the client applicant (1) was, at the time the claim arose, a member of the Massachusetts bar with an office within the Commonwealth and engaged in active practice, and (2) shall have died,

or have been disbarred or suspended from the practice of law, or have resigned from the Massachusetts bar.

Section 3. The Board, in determining in its discretion whether any application for reimbursement from the Fund shall be allowed, shall attempt in the public interest to establish fair, reasonable, and consistent principles for the allowance and rejection of claims in the circumstances existing from time to time, and shall consider the following matters and factors together with such other circumstances as the Board may deem appropriate and relevant:

(1) The amounts available and likely to become available to the Fund for payment of claims; the size and number of claims likely to be presented in the future; the total amount of losses caused by defalcations of any one attorney or associated groups of attorneys; and the unreimbursed amounts of claims theretofore recognized by the Board as meriting reimbursement but for which complete reimbursement has not been made.

(2) The amount of the claimant's loss as compared with the amount of the then known losses sustained by other applicants who may merit reimbursement from the Fund; the degree of hardship suffered by the claimant as compared with that suffered by other applicants; and any negligence or conduct of the claimant which may have contributed to the loss.

Section 4. In addition to other conditions and requirements, the Board may require any applicant, as a condition of any payment from the Fund, to execute such instruments, to take such action, and to enter into such agreements as the Board may direct, including assignments, subrogation agreements, trust agreements, and promises to cooperate with the Board in making and prosecuting claims or charges against any person. The Board may request individual lawyers and bar associations to assist it in the investigation of claims.

Section 5. At any stage of its investigation, the Board may issue a subpoena requiring the attendance and testimony of a witness, including the respondent, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the investigation. The subpoena shall require a witness to appear before the Board or its counsel at a specified date and time and shall specify any evidence to be produced. Testimony may be taken electronically or otherwise.

Section 6. The Board may issue a subpoena requiring the attendance and testimony of a witness, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Any request by the respondent for such a subpoena shall be made in writing to the Board which may forthwith issue the subpoena. The subpoena shall require a witness to appear before the Board at a specified date and time and shall specify the evidence, if any, to be produced.

4:06 Miscellaneous Powers and Duties of Clients' Security Board.

Section 1. In addition to other powers the Board, in order to carry out its functions and duties,

(1) may adopt, with the approval of this court, rules and regulations not inconsistent with these rules;

(2) may enforce, in its discretion, claims for restitution arising by subrogation, assignment, or otherwise;

(3) may invest or direct the investment of the Fund, or any portion thereof, in such investments as the Board may deem appropriate, and may cause funds to be deposited in any bank, banking institution, savings bank, or federally insured savings and loan association in this Commonwealth provided, however, that the Board shall have no obligation to cause the Fund or any portion thereof to be invested and may delegate some or all of its duties under this subsection (3) to the Administrator of the Board of Bar Overseers;

(4) may employ and compensate consultants, agents, legal counsel, and employees, and, subject to the prior written approval of this court or a justice thereof, may make contracts for the performance of administrative and similar services, for obtaining surety bond or insurance coverage useful or appropriate in providing protection to clients of attorneys, and for other goods and services appropriate in the performance of the Board's duties and may assign for administrative purposes its duties under subsection (4) to the Administrator of the Board of Bar Oversers, in accordance with the Board's written directions, which may be amended by the Board.

(5) may sue in the name of the Board without joining any or all of its individual members; and

(6) may perform other acts necessary or proper for the efficient administration of the Fund.

Section 2. Money shall be disbursed from the Fund only upon written order issued by action of the Board pursuant to this Chapter Four. At least once each year, and at such additional times as the court may order, the Board shall file with this court a written report of its administration of the Fund.

Section 3. The Board annually, and at such other times as this court may direct, shall obtain an independent audit by a certified public accountant of funds received and paid out by it in connection with the administration of the Fund. The cost of any such audit shall be paid from the Fund.

4:07 Lawyers Concerned for Lawyers Fund and Oversight Committee.

Section 1. Lawyers Concerned for Lawyers, Inc. (LCL) provides programs to assist lawyers, judges, other legal professionals and law students who may be impaired in their ability to function as a result of the disease of addiction, including but not limited to alcoholism or other chemical dependency. In addition, LCL provides assessment and referral services with respect to other psychological, emotional and physical impairments that might interfere with an individual's capacity to function as a lawyer. The Board shall bill and collect the portion of the annual registration fee designated by the court for LCL to provide funds for the operation of the lawyers assistance programs and, upon receipt, shall hold the funds collected in trust as a

separate fund for LCL. The court shall appoint an LCL Oversight Committee (hereinafter the Committee) to oversee the appropriate use of the fund so set apart for the operation of LCL. The court shall appoint to the Committee a representative from LCL, a present or former member of the Board of Bar Overseers, a present or former member of the Clients' Security Board, and three or more members of the Massachusetts bar.

Section 2.

(1) The Committee, as initially constituted, shall consist of such members as the court may determine, to be selected by the court as soon as reasonably practicable after the adoption of this rule. Thereafter the court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. LCL, the Board of Bar Overseers, the Clients' Security Board, the Massachusetts Bar Association, and each county bar association (including the Boston Bar Association as the bar association for Suffolk County) may nominate a person to fill a vacancy in the Committee. Any attorney may also submit in writing the names of nominees. The court may, but need not, make appointments to the Committee from the nominees so submitted. The court shall from time to time designate one member of the Committee as Chair and another as Vice Chair to act in the absence, for any cause, of the Chair.

(2) When the Committee is first selected, approximately one-third of the members shall be appointed for a term of three years, one-third for a term of two years, and one-third for a term of one year. Subsequent appointments to the Committee shall be for a term of four years. No member shall be appointed to more than two consecutive full terms but (a) a member appointed for less than a full term (originally or to fill a vacancy) may serve two consecutive full terms in addition to such part of a full term, and (b) a former member shall again be eligible for appointment after a lapse or at least of one year. The Committee shall act only with the concurrence of a majority of the members who are present provided, however, that a quorum shall be constituted of a majority of the Committee. A member whose term has expired shall continue in office until a successor is appointed.

Section 3.

(1) LCL shall annually, and at such additional times as the court may order, cause to be performed an independent audit of its books by a certified public accountant. Further, LCL shall annually, and at such additional times as the court may order, file with the court a written report of its operations. Copies of such audit and report will be furnished to the Committee.

(2) At least annually, LCL shall prepare and submit to the Committee for approval a budget of its financial requirements for the period covered by such budget. Upon approval of such budget, the Committee shall authorize in writing disbursement for such period from the funds held by the Board for LCL's account. Pursuant to such authority, disbursement shall be made at such times and in such manner as LCL may from time to time request of the Board in writing.

Section 4. Members of LCL and its staff shall be immune from liability for any good faith conduct in the course of their official duties.

Section 5. Pursuant to the provisions of Mass. R. Prof. C. 1.6(c) (Rule 3:07), a lawyer participating in an LCL program to provide lawyer assistance, as defined in Mass. R. Prof. C. 1.6(c), may require a person acting under the lawyer's supervision or control to sign a non-disclosure form approved by the Supreme Judicial Court.

4:08 Interpretation of Chapter Four of These Rules.

Section 1. The Board of Bar Overseers or the Clients' Security Board may request this court for an interpretation of any portion of this Chapter Four, and for advice and instructions as to their powers and duties. Either of these boards may submit to the court suggestions or proposals for revisions, modifications, or improvement of this Chapter Four, including proposals for affording protection to clients by surety bonds, group insurance of attorneys, or other means of insurance or indemnity coverage.

Section 2. Except where powers are expressly given to the full court, or the context indicates clearly that the full court alone is to have the power, the powers of this court may be exercised by a justice, subject to any appropriate review.

4:09 Amendment, Modification, Repeal.

This court may amend, modify, or repeal this Chapter Four of these rules at any time without prior notice and, in its discretion, may provide for the dissolution and winding up of the Clients' Security Fund.